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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 88.

U. X. GUNTER, JR., ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, ET AL., APPELLANTS,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED AUGUST 25, 1904.

(19,457.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1905.

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1 Transcript of Record.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, at the March term, 1902, before the Honorable Nathan Goff, United States circuit judge, holding said court according to the form of the act of Congress in such case made and provided, among other were the following proceedings, to wit:

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
versus
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

2 Order Substituting Copy of Record for Lost Record.

Filed 28 July, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County; J. O. McLendon, County Treasurer for Florence County, South Carolina, All of the said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

U. X. GUNTER, JR., as Successor in Office to G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, and S. W. G. Ship, Appellants,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

The original papers upon which the above entitled cause was heard before me as circuit judge having been accidentally
3 lost, and the counsel engaged in the cause having agreed that the copies of said papers hereto attached are to be used as copies of the lost papers, it is, on motion of Messrs. U. X. Gunter, Jr., attorney general of the State of South Carolina, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, attorneys for appellants with the consent of counsel for appellee,

Ordered that said copies hereto attached be substituted and filed in the office of the clerk of this court in the place and stead of said

lost papers, and that a transcript of the same be used on the appeal herein to the Supreme Court.

NATHAN GOFF,
Circuit Judge of the United States for the District of South Carolina, in the Fourth Circuit, at Chambers, Clarksburg, W. Va., July 25th, 1904.

We consent to above order:

U. X. GUNTER, JR.,
Att'y Gen'l of S. C., Attorney for Appellants.
J. P. BARRON,
For Attorneys for Appellees.

4 Agreement of Counsel.

Filed 28 July, 1904.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

It is agreed between the counsel in the above entitled cause that the transcript on appeal shall embrace the following papers, copies of which are hereto attached:

1. *Subpœna ad re.*
2. Petition of the Atlantic Coast Line Railroad Company.
3. Return of W. H. Lawrence, county treasurer.

4. Return of I. P. Mangum, county treasurer.
5. Return of J. O. McLendon, county treasurer.
6. Return of G. Duncan Bellinger, attorney general of the State of South Carolina; Stevenson & Matheson, S. W. G. Shipp, and J. M. Spears.
7. Amendment to return an- answer in paragraph 16.
8. Agreement as to admission of facts between W. F. Stevenson and J. T. Barron, attorneys.
9. Notice of motion that the Honorable Charles H. Simonton was incapacitated to hear cause by reason of having been former complainant's counsel in same.
10. Order of Judge Simonton transferring cause to some other judge.
11. Notice of hearing before the Honorable Nathan Goff, circuit judge.
12. Statement as to admission of facts and evidence at hearing.
13. Extract from Senate Journal, January 26th, 1874.
14. Tract from House Journal, same date.
15. Affidavit of James Norton.
16. Affidavit of J. T. Barron.
17. Copy original record in cause including:
    a. Petition of Thomas E. B. Pegues.
    b. Temporary injunction.
    c. Answers of R. J. Humphreys and John McCalla.
    d. Replication of petitioner.
    e. Answer of the Cheraw & Darlington R. R. Company.
    f. Order of Judge Bryan making injunction perpetual.
    g. Petition for appeal.
    h. Summons to Cheraw & Darlington R. R. Company on appeal.
    i. Notice of severance on part of Cheraw & Darlington R. R. Company.
    j. Waiver of security on appeal.
    k. Citation on appeal.
    l. Mandate of supreme court in cause.
18. Copy petitions to railroad board of assessors.
19. Plea of the Atlantic Coast Line Railroad Company before said board.
20. Statement of counsel as to action brought in said court and sought to be enjoined.
21. Copy of first cause of action in complaint sought to be enjoined.
22. Extract from Revised Statutes of South Carolina, 1893, embracing sections 233 to 242, in relation to assessment of railroad property.
23. Decree of circuit court, dated January 16th, 1903.
24. Statement of counsel as to the expiration of the term of office of G. Duncan Bellinger and his successors assuming the office in his place.

25. Supplementary decree of Judge Goff, dated July 31st.
Also 26. Petition for appeal and order allowing same, dated July 16th, 1904.
27. Assignment of errors.
28. Bond on appeal and order approving same, dated July 16th, 1904.
29. Citation to J. P. Mangum, W. H. Lawrence and C. S. Lucas, treasurers.
30. Notice of severance on appeal by J. P. Mangum, W. H. Lawrence and C. S. Lucas, county treasurers.
31. Citation on appeal to Atlantic Coast Line Railroad Company.
32. Clerk's certificate.

It is further agreed between counsel for appellants and appellee that inasmuch as the original papers upon which the above entitled cause was heard by the circuit judge were accidentally lost or destroyed by fire in the mail, before their return to the office of the clerk of said court, and true copies of said lost records have been found by attorneys in the cause are attached hereto, that said copies shall be substituted on file in the office of the clerk of this court for the originals so lost, and used in making the transcript on
7 appeal in this cause.

U. X. GUNTER, JR.,
Attorney General of S. C.,
STEVENSON & MATHESON,
J. M. SPEARS,
S. G. W. SHIPP,
Attorneys for Appellants.
J. T. BARRON,
For Attorneys for Appellee.

8 *Subpœna ad Respondendum.*

Filed October 2, 1901.

UNITED STATES OF AMERICA, FOURTH CIRCUIT, }
District of South Carolina. }

The President of the United States of America to G. Duncan Bellinger, attorney general of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, county treasurer for Chesterfield county, South Carolina; W. H. Lawrence, county treasurer for Darlington county, South Carolina, and J. O. McLendon, county treasurer for Florence county, South Carolina, all of said persons being citizens of the State of South Carolina:

You are hereby strictly commanded and firmly enjoined that all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of

STATE OF SOUTH CAROLINA,
County of Charleston.

Before me personally appeared W. N. Royall, who being duly sworn says that he is superintendent of the Atlantic Coast Line Railroad Company; that the allegations of the foregoing petition are true of his own knowledge except as to matters stated therein on information and belief and as to those matters he believes them to be true.

W. N. ROYALL, Supt.

Sworn to before me this 2nd, day of October, A. D. 1901.

[SEAL.] W. HUGER FITZ SIMONS,
Notary Pub., S. C.

18 Order for Injunction.

Filed 2nd October, 1901.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson and Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

On hearing the verified petition of the Atlantic Coast Line Railroad Company, on motion of J. T. Barron, with whom are Messrs. Theodore G. Barker and P. A. Willcox, attorneys for petitioner, it is

Ordered, that until the further order of this court G. Duncan
19 Bellinger, attorney general of the State of South Carolina, W. F. Stevenson and D. S. Matheson, J. M. Spears and S. W. G.

Shipp, plaintiff's attorneys be and they are hereby enjoined from prosecuting in the name of the State of South Carolina and as her attorney general and her attorneys an action for the recovery of the sum of money mentioned in the petition and demanded as taxes, or any part thereof, from the Atlantic Coast Line Railroad Company, and are enjoined from carrying on such action against said company, and against the property formerly of the Cheraw & Darlington Railroad Company in possession of the petitioner.

It is further ordered, that until the further order of this court, I. P. Mangum, county treasurer for Chesterfield county, South Carolina, be and is hereby enjoined from collecting the sum of ten thousand, four hundred and sixty one & 99/100 dollars, which is alleged he has heretofore demanded from the agent of the Atlantic Coast Line Railroad Company at Cheraw, South Carolina, and any fractional part of said sum from the Atlantic Coast Line Railroad Company.

It is further ordered, that until the further order of this court W. H. Lawrence, county treasurer for Darlington county, south Carolina, be and is hereby enjoined from collecting the sum of sixteen thousand, two hundred and fifty & 74/100 dollars, which it is alleged that he has heretofore demanded from the agent of the Atlantic Coast Line Railroad Company at Darlington, South Carolina, and any fractional part of the said sum, from the Atlantic Coast Line Railroad Company.

It is further ordered, that, until further order of this court J. O. McLendon, county treasurer for Florence county, South Carolina, be and he is hereby enjoined from collecting the sum of three thousand one hundred and sixty four & 84/100 dollars, which it is alleged — has heretofore demanded from the agent of the Atlantic Coast Line Railroad Company at Florence, and any fractional part of said sum, from the Atlantic Coast Line Railroad Company.

It is further ordered, that the said G. Duncan Bellinger, W. F. Stevenson, D. S. Matheson, J. M. Spears, S. W. G. Shipp and the said I. P. Mangum, the said W. H. Lawrence and the said J. O. McLendon do show cause before the circuit judge of this court at Charleston, S. C., on the 15th, day of October, A. D. 1901, at eleven o'clock forenoon, or as soon thereafter as counsel can be heard, why this injunction should not be made perpetual and that any return which may be made to this rule shall be served on the attorneys for petitioner not less than three days prior to said day.

It is further ordered that the petition herein be filed and a copy hereof served upon the respondents above named and that the petitioner do enter into bond to the clerk of this court in the sum of one thousand dollars in accordance with the rules of this court.

And lastly it is ordered, that *subpœna ad respondendum* do issue from the office of the clerk of the circuit court for the district of South Carolina to the above named G. Duncan Bellinger, W. F. Stevenson, D. S. Matheson, J. M. Spears, S. W. G. Shipp, I. P. Man-

gum, W. H. Lawrence, and J. O. McLendon, requiring each of them to appear before this court and to answer the petition herein filed.

CHARLES H. SIMONTON,
Circuit Judge.

2, October, 1901.

21 Return of W. H. Lawrence, County Treasurer.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw & Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina.

The respondents, W. H. Lawrence, as the treasurer of Darlington county, for a return to the rule herein served on him shows:

I. That he has discharged all the duties imposed on him by law, relative to the said back taxes, and has no further duty with regard to the same, and does not intend, nor has threatened to do any act, nor take any proceedings relative thereto.

II. He has not sufficient information to form a belief as to the allegations of the petition not herein admitted and hence —.

22 III. That the court has no jurisdiction of the cause against him, for the reason that he is acting merely as an official of the State, and has committed no wrong or trespass against the property of the petitioners, and does not contemplate any such wrong or trespass, and the action is really and in fact an action against the State of South Carolina, and the court has no jurisdiction thereof.

IV. He denies the conclusiveness of the judgment relied on against him, and alleges on the other hand that the same cannot be enforced in this way if it were conclusive on him.

Wherefore he prays that the rule as to him be discharged.

G. DUNCAN BELLINGER,
Attorney General.
STEVENSON & MATHESON,
J. M. SPEARS,
S. W. G. SHIPP,
Defendant's Attorneys.

23 Return of I. P. Mangum, County Treasurer.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurers for Chesterfield —, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina.

The respondent, I. P. Mangum, as the treasurer of Chesterfield county, for a return to the rule herein served upon him shows:

I. That he has discharged all the duties imposed upon him by law relative to the back taxes, and has no further duty with regard to the same, and does not intend, nor has threatened to do any act, nor to take any proceedings relative thereto.

II. He has not sufficient information to form a belief as to the allegations of the petition not herein admitted and hence de-
24 nies the same.

III. That the court has no jurisdiction of the cause against

him, for the reason that he is acting merely as the official of the State, and has committed no wrong or trespass against the property of the petitioners, and does not contemplate any such wrong or trespass, and the action is really and in fact an action against the State of South Carolina, and the court has no jurisdiction thereof.

IV. He denies the conclusiveness of the judgment relied on against him, and alleges on the other hand that the same cannot be enforced in this way if it were conclusive on him.

Wherefore he prays that the rule as to him be discharged.

G. DUNCAN BELLINGER,
Attorney General.
STEVENSON & MATHESON,
J. M. SPEARS,
S. W. G. SHIPP,
Defendant's Attorneys.

25 Return of J. O. McLendon, County Treasurer.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw & Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurers for Chesterfield —, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina.

The respondent, J. O. McLendon, as the treasurer of Florence county, for a return to the rule herein served upon him shows:

I. That he has discharged all the duties imposed on him by law relative to the back taxes, and has no further duty with regard to

the same, and does not intend, nor has threatened to do any act, nor to take any proceedings relative thereto.

II. He has not sufficient information to form a belief as to the allegations of the petition not herein admitted and hence denies the same.

26 III. That the court has no jurisdiction of the cause against him, for the reason that he is acting merely as an official of the State, and has committed no wrong or trespass against the property of the petitioners, and does not contemplate any such wrong or trespass, and the action is really and in fact an action against the State of South Carolina, and the court has no jurisdiction thereof.

IV. He denies the conclusiveness of the judgment relied on against him, and alleges on the other hand that the same cannot be enforced in this way if it were conclusive on him.

Wherefore he prays that the rule as to him be discharged.

G. DUNCAN BELLINGER,
Attorney General.
STEVENSON & MATHESON,
J. M. SPEARS,
S. W. G. SHIPP,
Defendant's Attorneys.

27 Return of G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson & Matheson, S. W. G. Shipp, and J. M. Spears.

Filed Jan. 19, 1903.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. J. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; J. M. McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: ATLANTIC COAST LINE RAILROAD COMPANY, &c.,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina, &c.

The respondents, G. Duncan Bellinger, attorney general of the State of South Carolina, Stevenson & Matheson, S. W. G. Shipp,

J. M. Spears, to the rule above and for the cause and for answer to the petition served on them, reserving to themselves all advantage of exception to said petition which may be taken to its manifold uncertainties and insufficiencies jointly and severally show:—

I. That this court has no jurisdiction to proceed against them in this cause for the reason that they are acting purely as agents for the State in whose interest and name the action sought to be stopped is being pros ated—and are proceeding in a judicial proceeding to test the right of the State to collect taxes set forth, and they do not contemplate or threaten any interference with the proper rights or franchises of the Atlantic Coast Line Railroad
28 Company until it has been decided by courts of competent jurisdiction that they are liable for taxes and the petitioner can have settled in the courts of last resort in such proceedings. That these respondents have no personal interest in the suit but are acting by virtue of the right of the State and their duty to her as attorney general and counsel employed by the State, and they submit that this is an action or proceeding in fact against the State of South Carolina and the court is without jurisdiction to hear or determine the same.

II. They further show that the State of South Carolina was neither party or privy to the case of Pegues against Humphreys and which is now attempted to be enforced against her and she is not bound by any judgments rendered in said cause, nor by any judgment against any of her officials nor is she estopped by any acts, omissions or neglects of any of her officials relative to the said matter and neither she nor her attorneys acting for her are bound in any way by the alleged judgment or any proceedings relating thereto, nor can they be made applicable to either the said State or her attorneys in the way here contemplated.

III. That the allegation of the petition that there is a contract between the said State and the Cheraw & Darlington Railroad Company is untrue and it was on the admission of that fact that the decree in the above case was based, said fact being alleged in the original complaint herein based on the allegation that the Cheraw & Darlington Railroad Company did not build its road until after the act of December 17th, 1863, and therefore the building of said road was the consideration for the alleged exemption and made the same a contract, and the fact was conceded by the defendants Humphreys and McCalla and the judgment that it was a contract irrepealable was based on that admission whereas the road was completed in 1855, as shown by the stipulation of Mr. J. T. Barron, counsel for said road, hereto attached, and marked Exhibit "A," and the State seeks in the case it has instituted against the petitioner in the State court to make that question which has not heretofore been
29 made and the said question is not *res judicata* and she has the right to have that question settled and these respondents allege that the said alleged exemption was a mere gratuity if anything and was repealed by the constitution of 1868, and to enjoin these re-

spondents from prosecuting said action will, in effect, enjoin the State and they make the said question here also, and deny that the decree relied upon herein is final as to such question — is binding upon them.

IV. They allege further that the words used, to wit: "rights, powers and privileges" in the act of December 17th, 1863, would not confer the right to exemption from taxation possessed by the Northwestern Railroad Company upon the Cheraw & Darlington Railroad Company but it would require some clear, definite expression evincing clearly the intention to part with the right to tax before it would be held to exempt the Cheraw & Darlington Railroad Company from taxation and no such question was made and litigated by the defendants in the above case, but, on the contrary, it was conceded that the word "privilege" would confer an exemption and the State by her attorneys has the right to have that question litigated and to enjoin them herein from prosecuting the State's action to test the same will enjoin the State itself from having the matter heard and settled in courts of competent jurisdiction.

V. That there is plain and adequate remedy at law and there is no ground for the interference of the court of equity.

VI. They deny on information and belief that petitioner is a resident or citizen of the State of Virginia, but allege on the other hand that it is a corporation created under and by virtue of the laws of the State of South Carolina and they have not sufficient information to form a belief as to whether it owns all the stock and assets of the Cheraw & Darlington Railroad Company, and they deny the same, and they further deny that the bill of complaint in the original cause prayed an injunction against all the officers of the State of South Carolina who were charged with the collection of taxes but alleged that it asked and obtained an injunction against the treasurer of Darlington county and tax collector of Chesterfield
30 county only and restrained them from issuing execution and selling the property of the company.

VII. They deny that the State of South Carolina has ever acquiesced in the exemption claimed by said company, but they admit that for many years her officers failed to collect the same and that a suit brought in the State court failed for the reason that they had not been assessed and placed on the books.

VIII. They deny that the State board of railroad assessors was served with the decree in this cause or that they gave a retroactive effect to the statute of 1900, or that they were in contempt in making their assessment and allege on the other hand that they were acting as State officers and it was the State acting through them and the State was neither a party to nor bound by the judgment in the above case, but it was *res inter alios acta*.

IX. They admit that the lien of said taxes is upon petitioner's property but deny that it is a cloud thereon but allege that it is a just and valid debt due the State and she has directed these respondents to bring suit to recover the same and as her attorneys they are

South Carolina, at Charleston, S. C., on the 15th, day of October, 1901, after the service thereof; then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the petition of Atlantic Coast Line Railroad Company, a citizen of the State of Virginia, *In re* Thomas E. B. Pegues, complainant, against R. I. Humphreys, and others, defendants.

And also, that you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the registry of said court, your plea, answer or demurrer, to the said bill of complaint.

Hereof fail not under the pain of one hundred pounds.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in South Carolina district, aforesaid, the 2nd, day of October in the year of our Lord one thousand nine hundred and one, and in the one hundred and twenty sixth year of the sovereignty and Independence of the United States of America.

9 Marshal's Return of Service.

The returns of the marshal show that copies of the petition, *subpœna ad re.* and the order of injunction were served personally upon each of the respondents therein named.

10 Petition of the Atlantic Coast Line Railroad Company.

Filed 2nd October, 1901.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

To the honorable the judges of the said circuit court:

The petition of the Atlantic Coast Line Railroad Company, a citizen of Virginia, respectfully shows:

First. That it is a body politic and corporate created by the laws of the State of Virginia as the Atlantic Coast Line Railroad
11 Company of Virginia, and a citizen of said State, since then consolidated under the laws of Virginia, of North Carolina, and of South Carolina with railroads in those States and now known as, and doing business under the name of, the Atlantic Coast Line Railroad Company.

Second. That as such company it is the purchaser and legal owner of the railroad in South Carolina extending from Florence in the county of Florence, (formerly a part of the county of Darlington) to Cheraw, in the county of Chesterfield, in said State, of all the other property and assets which were of the Cheraw and Darlington Railroad Company of South Carolina remaining in the possession of said company on the 18th. day of July, 1898—except such as has since that date ceased to exist, of the stock of said company, and of

all the rights, privileges and franchises to which said Cheraw and Darlington Railroad Company had theretofore been and was entitled.

Third. That the title of your petitioner to said property and stock is derived through several intermediate ownerships and transfers from the persons and corporations who were in the year 1870 the owners of shares of the stock of the Cheraw and Darlington Railroad Company, including the twenty-nine shares of said stock which was then owned by Thomas E. B. Pegues, a citizen of the State of Mississippi, who was the complainant in the above named suit in equity, and who in said year brought his bill of complaint in behalf of himself, and for the protection of the property of the Cheraw and Darlington Railroad Company and its owners and of all the stockholders and creditors of said company.

Fourth. That the record of this court in above entitled suit shows, that the bill of complaint asserted, on behalf of the Cheraw and Darlington Railroad Company and its stockholders, that the property of said company was exempt, by virtue of its amended charter, from all taxation by the State, and prayed an injunction against the officers of the State of South Carolina who were charged with
the collection of taxes, restraining them from enforcing the
12 collection of taxes levied in the name of the State upon the
property of the Cheraw and Darlington Railroad Company; that the contract right of said company to said exemption was determined in said suit, and that an order for a writ of injunction was granted by the circuit court for the district of South Carolina and affirmed on appeal by the Supreme Court of the United States, which injunction was by order of said courts made perpetual.

Fifth. That the State of South Carolina acquiesced in said right of exemption so adjudged to belong to the Cheraw and Darlington Railroad Company and to its stockholders, from the year 1872, when the decision of said supreme court was rendered and when its mandate was issued, down to the year 1897, when its then attorney general attempted without success to enforce by an action the collection from said company of certain alleged unpaid taxes claimed by him to be due to the State, for twenty years then preceding.

Sixth. That on the nineteenth day of February, A. D. 1900, and act of the assembly of the State of South Carolina was approved, entitled "An act to provide for the assessment for taxation of railroad property which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due, and for the collection thereof," which act is as follows:

SECTION 1. Be it enacted by the General Assembly of the State of South Carolina, That when railroad property has not been returned nor assessed for any year, and no taxes were paid thereon, and more than a year has elapsed since taxes for such years, if assessed at the proper time, would have been due, the said taxes shall be assessed by the railroad board of assessors, which shall be convened in extra

session by the secretary of state for such purpose, on the petition of any county supervisor in whose county any part of such railway may lie.

SECTION 2. That such board shall fix the value of said road for each year in which it shall appear that said road has been off the books, separately, and its valuation, and this, with the number of miles in each county, shall be certified to the respective county auditors, as the valuation of railroad property is done when regularly returned and assessed.

13

SEC. 3. That said auditor shall enter the said assessment each year separately in the tax books in his office for the respective years, and charge the taxes on said assessment under the levies for those years, *and* if they had been assessed and levied at the usual time; and he shall furnish a certified statement to the county treasurer, showing the property taxed, the value of the same, and the amount due for each year separately.

SEC. 4. That the treasurer shall immediately demand the said taxes of the company in default, or, if he find the property in control of another company, demand shall be made of the company which he finds in the possession of the property.

SEC. 5. That said taxes shall become due as soon as said demand is made, and, if they are not paid within sixty days from the demands made, there may be an action brought in the name of the State by the attorney general, and such counsel as the counties interested may employ, against the company in default, and any company which may be in possession of the property which has escaped taxation, for the recovery of said taxes; and suit may be brought for each year separately or for all the years consolidated.

SEC. 6. The assessment herein provided for shall be limited to the period of ten years immediately preceding the restoration of said railroad property to the tax books, and no recovery shall be had hereunder for a longer period than ten years.

SEC. 7. The provisions of this act shall not apply to any railroad property which may be hereafter adjudged by the courts to be exempt by law from the taxes which may be assessed against it under this act.

SEC. 8. That nothing herein contained shall be construed to impair in any way the right of the State, or any of its officers or agencies, to collect such taxes in any other method provided by law.

14

Approved the 19th day of February, A. D. 1900.

Seventh. Your petitioner is informed and believes that E. T. King, county supervisor for the county of Chesterfield, has lately presented to the railroad board of assessors of the State of South Carolina, of which the attorney general of the said State is a member and legal adviser, *ex officio*, his petition praying that said board be convened in extra session and that taxes may be assessed upon the property known as the Cheraw and Darlington railroad for the years prior to the year 1899; that said board has, against the protest of your

petitioner, construed said act of assembly retroactively as applicable to the non-taxable property of your petitioner, (which was the property of the Cheraw and Darlington Railroad Company) and has treated said property as liable to be now assessed for the taxes of the several years which *has* passed, viz: the fiscal years covering periods denominated by the years 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, notwithstanding its said exemption and has disregarded the judgment of this honorable court and of the Supreme Court of the United States and has proceeded upon said petition to assess the property of your petitioner after notice of said orders of injunction (copies of which were served upon said board) and in contempt of the authority of said supreme and circuit courts of the United States of America.

Eighth. Your petitioner is further informed and believes it to be true that said board has certified its valuation of said property for each of the years above named, together with the number of miles in each county to the respective county auditors of Chesterfield, Darlington, and Florence counties.

Ninth. Your petitioner is also informed and believes it to be true that the said auditors respectively, viz: E. F. Malloy, county auditor for Chesterfield county; J. P. Mozingo, county auditor for Darlington county, and J. S. Hutchinson, county auditor for Florence county, have each entered assessments for each year separately in the tax books of his office for the respective years and have charged the taxes on said assessments under the levies for those years as
15 if they had been assessed and levied at the usual time, and that they have furnished to the respective county treasurers of their respective counties a certified statement showing the property taxed, the value of the same, and the amount now assumed to be due for each year separately, according to the terms of said act.

Tenth. That, by the statutes of said State, all taxes legally assessed are declared to be a debt due to the State by the parties against whom the same shall be charged and shall be a lien upon the property of the tax debtor; and the entry of the taxes above mentioned upon the tax books of said counties respectively has recorded an intended encumbrance upon the property of your petitioner and cast a cloud upon its title, greatly to the injury of your petitioner's credit and to the interest of its stockholders.

Eleventh. That your petitioner is entitled in the law to all the rights to which the stockholders of the Cheraw and Darlington Railroad Company, in said suit of Thomas E. B. Pegues, above mentioned, were adjudged to be entitled, and is entitled to the exemption of its property from all taxation, as adjudged by said court and to the benefit and protection of the decrees of said courts and the orders of injunction issued therein.

Twelfth. Your petitioner is informed further that the county treasurer of Chesterfield county, I. P. Mangum; the county treasurer for Darlington county, W. H. Lawrence, and the county treasurer for Florence county, J. O. McLendon, have each received from

the county auditors of their respective counties above named certified statements of sums so charged as taxes by the said county auditors on the tax books and have demanded payment each of the several amounts so certified respectively (being ten thousand four hundred and sixty-one & 99 / 100 dollars for Chesterfield county, sixteen thousand two hundred and fifty & 74 / 100 dollars for Darlington county, and three thousand one hundred and sixty-four & 84 / 100 dollars for Florence county); the total amount so claimed and demanded by said tax officials in the name of the State of South Carolina
16 being the sum of twenty-nine thousand eight hundred and seventy-seven & 57 / 100 dollars.

Thirteenth. Your petitioner has refused to pay the taxes so charged against it and so demanded, being advised that the same are wholly illegal and unjust. That said assessment, levy and demand made and action brought under said act violate the obligation of the contract made between the State of South Carolina and the Cheraw and Darlington Railroad Company.

Fourteenth. That the attorney-general of the State, the Honorable G. Duncan Bellinger, and Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, plaintiff's attorneys, have commenced a proceeding purporting to be under said act of assembly above set forth, an action in the name of the State against you- petitioner as the company found to be in possession of the property formerly owned by the Cheraw and Darlington Railroad Company, for the recovery of said taxes.

Fifteenth. Your petitioner therefore prays that it may be allowed the benefit and protection of said decrees of this honorable court and of said *Du*preme Court of the United States in said suit made, and due process to enforce obedience to the decrees of this court of 1870 and 1872 above referred to, against the above named county treasurers as the present tax officials of said State, and the said G. Duncan Bellinger, attorney general, and the said Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, plaintiff's attorneys, requiring each of them to answer this petition, and that it may have a writ of injunction issued from this court restraining the said officials and also the said attorney general and the said Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, plaintiff's attorneys, from proceeding under said act of the assembly and from prosecuting an action in the name of the State against your petitioner for the recovery of said amounts claimed as taxes, and against each of the above named county treasurers enjoining and restraining them and each of
17 them, and any and all other persons acting for or in the name of said State, from collecting all such amounts so claimed as taxes, and any other amounts which may be claimed as taxes in any method provided by law for the collection of taxes legally imposed.

J. T. BARRON, with whom are
THEODORE G. BARKER,
P. A. WILLCOX,
Attorneys for Petitioner.

39 Notice of Hearing Before the Honorable Nathan Goff, Circuit Judge.

Filed Jan. 19, 1903.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, J. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

Take notice, that on Monday, the 18th day of November, 1901, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, the matters arising on the rule to show cause herein, postponed by order of his honor Charles H. Simonton, circuit judge, for reasons stated in his order of date October 25th, 1901, will be called for hearing before his honor Nathan Goff, circuit judge, at his chambers in the city of Richmond, State of Virginia, 26th day of October,
40 1901.

J. T. BARRON,
THEODORE G. BARKER,
P. A. WILLCOX,
Counsel for Petitioner.

To G. Duncan Bellinger, attorney general, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, counsel for defendants, respondents.

41 Statement as to Admission of Facts and Evidence at Hearing.

Filed Jan. 19, 1903.

At the hearing of the cause the affidavit of W. F. Stevenson, Esq., was submitted by the respondents, to the following effect: * * * That the consolidation of the Cheraw & Darlington Railroad Company into the A. C. L. Railroad Company of S. C. under the act of 1897, 22 Statutes at Large of S. C., page 635, on the 18th day of July, 1898. Of this affidavit no copy was kept and it has been lost with the other original papers. The petitioner offered in evidence its chain of title to the property and stock of the Cheraw and Darlington Railroad Company, including the stock once held by Thomas E. B. Pegues which showed that the petitioner was now the owner of that stock and of all other stock, property and assets of the Cheraw & Darlington railroad as alleged in the petition. The petitioner also offered in evidence the reports of D. H. Chamberlain, and of Samuel W. Melton, as attorney general, as to the case of Pegues *vs.* Humphreys, and the action of the legislature of South Carolina thereon.

42 Extracts from Senate Journal, Session of 1874, Monday, January 26, 1874.

Filed Jan. 19, 1904.

The senate assembled at 12 m., and was called to order by the president.

The roll was called, and, a quorum answering to their names, the president announced the senate ready to proceed with business.

On motion of Mr. J. M. Smith, the reading of the journal of Saturday was dispensed with.

Communication from the Attorney General.

The president laid before the senate the following communication:

To the Honorable R. H. Gleaves, president of the senate.

SIR: I beg leave respectfully to submit herewith the annual report of the attorney general to the General Assembly, and have the honor to be,

Very respectfully, your obedient servant,

SAM'L W. MELTON,
Attorney General.

Annual Report.

STATE OF SOUTH CAROLINA,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, December 1st, 1873.

To the honorable the General Assembly of the State of South Carolina:

In accordance with the requirement of section 31, chapter XVI, General Statutes, I respectfully submit a report of the "cases argued, tried or conducted by the attorney general in the supreme court and circuit courts during the past year, with such other information in relation to the criminal laws and such observations and statements, as, in my opinion, the criminal jurisdiction and the proper and economical administration of the criminal law warrant and require."

43 This concludes my report of the cases argued, tried or conducted by the attorney general in the supreme court and circuit courts of the State. During the year several cases, involving issues of vast importance to the State, have been heard in the Supreme Court of the United States, a report of which would, doubtless, be acceptable to the General Assembly. Before that tribunal, the attorney general of the State is not required by law to appear, nor can he so do with due regard to other duties; and it has been the custom in such cases, where matters of the gravest moment to the State are finally determined, to retain counsel learned in the law and of experience in that court. This I had not been authorized to do by the General Assembly, and no fund for that purpose had been placed at the disposal of my office; whilst the civil contingent fund, to which I had looked for this purpose, proved to be unavailable. In this contingency, my predecessor, Hon. D. H. Chamberlain, who had conducted the cases below, and was fully possessed of them, consented, upon my own solicitation and that of the governor, to appear in behalf of the State, and, without the usual advantage of associate counsel in Washington, conducted the several arguments with eminent ability and success. I have respectfully to ask that the General Assembly will approve my action, and recognize these services by a suitable and adequate appropriation.

Reuben Tomlinson, *et al.*, appellants *vs.* Thomas Branch, *et al.* appellees. This case involved the right of the State to tax the property of the South Carolina Railroad Company, and was first heard and decided adversely to the State in the circuit court of the United States at Charleston, in April, in 1870. An appeal was taken by my predecessor to the Supreme Court of the United States, where the case was argued in March 1873. The decision of the court, according to my construction, establishes the right of the State to tax all the line, and property pertaining thereto, held under the charter of the original "South Carolina Canal and Railroad Com-

pany," including the whole line from Charleston to Hamburg.
44 The line and property from Branchville to Columbia, and from Kingville to Camden, is held to be exempt from taxation by the State.

The decision directed the circuit court to make a proper division of the property of the company common to these lines and to apportion the same between the taxable and non-taxable portions of the company's road. At the April term of the court in Charleston, a referee was appointed to inquire and report upon the matters in controversy, pending which the injunction against the collection of taxes from the company is continued. It has thus far been impracticable to procure the necessary data for the hearing before the referee; but I expect to be able to present the report in time for a hearing at the ensuing April term. The only serious point yet in controversy is in the claim of the company to have the line and property of the road between Charleston and Branchville included in the property to be apportioned, whilst we claim that this line and property are to be wholly included in the taxable portion. It would seem to be impossible to distort the text of the decision so as to sustain this position of the company, and I cannot but think that the position is taken merely to postpone the day of payment. I must, nevertheless, regard it as a possible contingency that the case must again be carried to the Supreme Court of the United States. The amount involved to this State, roughly estimated, will not fall short of two hundred thousand dollars.

Reuben Tomlinson, *et al.*, appellants *versus* Morris K. Jessup, appellee. This case involved the right of the State to tax the property of the Northeastern Railroad Company, and arose in the same manner, and was argued at the same time in the Supreme Court of the United States with the case of the South Carolina Railroad Company. The decision of the court affirms, beyond controversy, the rigut of the State to tax the property of the company, and I have been informed that satisfactory arrangements have been perfected with the comptroller general for a settlement of the delinquent taxes due by this company to the State.

45 R. J. Humphreys, *et al.* appellants *vs.* Thomas E. B. Pegues, appellee. The same questions, involving the right of the State to tax the property of the Cheraw and Darlington Railroad Company, were presented in this case, which was argued in the Supreme Court of the United States at the same time with the two cases last preceding. The decision of the court holds that this company is exempt from taxation under the terms of the charter.

* * * * * * *

On motion of Mr. Swails the report was received as information, and ordered to be entered on the journal.

* * * * * * *

Extracts from House Journal, Session of 1874, Monday, January 26, 1874.

Filed Jan. 19, 1903.

Pursuant to adjournment, the house met at 12 m.
The speaker took the chair.
The roll was called, and a quorum announced.
Prayer by Rev. E. Hayes.
The journal of Saturday was read and confirmed.

Bills and Resolutions.

The speaker laid before the house the report of Hon. S. W. Melton, attorney general.
Referred to the committee on the judiciary.

46 Affidavit of James Norton.

Filed Jan. 19, 1903.

STATE OF SOUTH CAROLINA, }
County of Marion. }

Personally comes James Norton, who being duly sworn says: That during the years 1891–94, he was chief clerk in the office of comptroller general of the State of South Carolina and the clerk of the State board of railroad assessors; that when the other railroad companies filed returns of their property for taxation, the Cheraw & Darlington railroad did not do so, and when the matter was called to the attention of that company, the representatives thereof claimed that its property was exempt from taxation. That thereupon the matter was referred to the then attorney general of the State of South Carolina, who was a member of the State board of railroad assessors, and who there replied that the property of said company was exempt from taxation, and that it had been so decided by the Supreme Court of the United States, the opinion of the attorney general being given to said board in session as a member and advisor thereof, and that thereafter during the years that deponent was chief clerk, as aforesaid, and during the years that deponent was comptroller general of the State of South Carolina, no further attempt was made by the tax department of the State to tax the property of said company, and the exemption of same from taxation was acquiesced in by said department, upon the oral advice of each succeeding attorney general to the respective succeeding board of assessors.

JAMES NORTON.

Sworn to before me this 13th, day of November, 1901.
GEO. R. REAVES, [L. S.]
Notary Public.

47

Affidavit of J. T. Barron.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi,
vs.
R. J. HUMPHREYS, a Citizen of South Carolina, &c., ET AL.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, &C., ET AL.

STATE OF SOUTH CAROLINA,
County of Richland.

Personally comes J. T. Barron, who being duly sworn, says: That he was counsel for the late Cheraw & Darlington Company during the years for which taxes are now claimed by the treasurers of Chesterfield, Darlington and Florence counties, and is one of the counsel of the Atlantic Coast Line Railroad Company in this matter; that deponent, together with Major Theo. G. Barker, appeared before the State railroad board of assessors at the extra session thereof in the year 1900, called for the purpose of assessing the value of the Cheraw & Darlington Railroad Company's property, at the instance of E. T. King, county supervisor of Chesterfield county, when deponent and Major Barker protested against the proceeding and filed a written objection thereto, a copy of which is herewith filed and styled "Plea of the Atlantic Coast Line Railroad Company," and that the said Major Theo. G. Barker then and there exhibited and read to the said board certified copies of the orders or decrees of in-

48 junction, in the case of Pegues *vs.* Humphreys, of date 27th, April and 10th, July, 1871; and also the mandate of the supreme court in the said case, made at the term of said court on the first Monday of December, 1872, and dated the 10th of March, 1873.

J. T. BARRON.

Sworn to before me this 16th, day of November, 1901.

JOHN J. EARLE, [L. S.]
Notary Public for South Carolina.

49 Copy Original Record in Cause Including Bill for Injunction and Relief.

Filed Jan. 19, 1903.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

To the honorable the judges of the fourth circuit of the United States:

The bill of complaint of Thomas E. B. Pegues, a citizen of Mississippi, against the Cheraw and Darlington Rail Road Company, a corporation under act of the General Assembly of the State of South Carolina, and doing business in said State, R. I. Humphreys a citizen of South Carolina and county treasurer for the county of Darlington, and John McCalla a citizen of South Carolina, county treasurer for the county of Chesterfield in the State of South Carolina, showeth unto your honors, that:

1. Your orator is the *bona fide* holder of twenty nine shares of the capital stock of The Cheraw and Darlington Rail Road Company, one of the defendants, and has been a stockholder therein since the organization of the company.

That the said Cheraw and Darlington Rail Road Company is a body corporate by an act of the General Assembly of the State of South Carolina passed the nineteenth day of December in the year of our Lord eighteen hundred and forty nine. That before the construction of said rail road under its charter by an act of the General Assembly of South Carolina passed the seventeenth day of December in the year of our Lord one thousand eight hundred and sixty three, section five of the above first named act was amended "so as to read as follows, to wit: That all the powers, rights and privileges granted by the charter of the North Eastern Rail Road Company are hereby granted to the Cheraw and Darlington Rail Road Company, and subject to the conditions therein contained except
50 as to the amount of capital stock, and except in so far as the special provisions of this act may otherwise require the same to be modified or varified."

It was also provided in said act of assembly (A. D. 1863 sec. III) "that this charter shall in no wise be subject to the provisions of the forty first section of the act of the General Assembly of South Carolina passed on the seventeenth day of December in the year of our Lord one thousand eight hundred and forty one."

The charter of the North Eastern Rail Road Company referred to in said act, is contained in an act of the General Assembly of the State of South Carolina passed the sixteenth day of December A. D. 1851, entitled "An act to incorporate the North Eastern Rail Road

Company," which was subsequently amended by an act of the General Assembly passed the nineteenth day of December A. D. 1855, entitled "An act to amend the charter of the North Eastern Rail Road Company and for other purposes." By the terms of the amended charter of the North Eastern Rail Road Company A. D. 1855, it was declared "Sec. L. That the stock of the North Eastern Rail Road Company and the real estate that it now owns or may hereafter acquire which is connected with or subservient to the works authorized in the charter of the said company shall be and the same is hereby exempted from all taxation during the continuance of the present charter of the said company."

2. Your orator is advised that the exemption from taxation granted by the State of South Carolina to the North Eastern Rail Road Company by amendment of its charter in 1855, constitutes a part of the powers, rights and privileges, secured to the Cheraw and Darlington Rail Road Company by the above recited act of assembly A. D. 1863, and the acceptance thereof by the stockholders of the Cheraw and Darlington Rail Road Company constitutes a contract between the State of South Carolina and the stockholders of said company.

3. Your orator further shows unto your honors, that said
51 amendment of the charter of the said company, passed in 1863, was accepted by the company, which has been doing business thereunder since its organization.

That out of said contract certain legal rights arose and have become vested in said company so incorporated and under it, in the creditors of said company and in divers other persons, who have dealt with the said company upon the faith of its chartered rights, pribileges and exemptions.

4. That your orator became a purchaser of the shares in the capital stock of said corporation and outlayed large sums of money in acquiring the rights of a shareholder therein and claims the protection of the unimpaired obligations of the contract of said State with the company.

5. That the said company has fulfilled all of the requirements of its charter and is well entitled to protection in all the rights privileges and exemptions which belong to it under its contract with the State.

6. That by an act of the General Assembly of the State of South Carolina, passed at a special session in the year 1868, entitled: "An act providing for the assessment and taxation of property" it was declared.

"(SEC. II.) The president and secretary of every rail road company whose track or road-bed, or any part thereof, is in this State, shall annually, between the first day of September and twentieth of October, return to the auditor of State under their oaths, the total length of said road, the total length of said road in this State, and the length thereof in each county, township, city and incorporated village in this State; the total length of their double track in this State, and the length thereof in each county, township, city and in-

corporated village of this State; the total length of all their side tracks and the length thereof in each city, county, township and incorporated village in this State; the location and value of all
52 their shops, depots, grounds, station houses, wood and water stations, buildings, stationary engines, tools, implements and fixtures in South Carolina, and all other real estate necessary to the daily running operations of the road; the number and value each of all their locomotive engines, passenger, freight, platform, gravel, construction, hand and other cars, the value of their moneys and credits, the total value of the entire road, appurtenances and equipments, and the total value of said road in South Carolina with its appurtenances and equipments.

(SEC. 12.) The president and secretary of every rail road company mentioned in the preceding section, shall also, annually, between the first of September and the twentieth of October, return to the county auditor of each county in South Carolina, through or into which such road, or any part thereof, may be located, a statement of the value of said road, and the property of the company in said county, and in each of the townships, cities and villages of said county, through or into which said road, or part thereof, is located, in the manner and form required by this act, in the return to the auditor of State.

(SEC. 13.) In ascertaining the value of the road and property of any railroad company, the value of the right of way, bed and track of the whole road, shall be fixed, and such value apportioned pro rata to each mile of the main track; and to the value of the number of miles of main track in each township, city and incorporated village of each county in this State, through and into which said road is located, shall be added the value of the real estate, fixtures, stationary engines, tools, implements, machinery, and other stationary property provided for use in the daily operations of the road, situate in said township, city or village, and the total value of the rolling stock, moneys and credits shall be apportioned pro rata to each mile of the main track of said road, and the amount thereof according to the number of miles of main track in each town-
53 ship, city and village in this State, added to the value of the main track in such township, city and village, respectively: And the aggregate value of said road and property in this State, and in each county, city, township and incorporated village of this State, through or into which said road is located, shall be stated in said return.

(SEC. 14.) The return and oath required by this act of officers of rail road companies, shall be made in such form as shall be prescribed by the auditor of State.

(SEC. 15.) If any rail road, its appurtenances, equipments, etc., shall be in the hands of a receiver or other officer, such receiver or other officer shall make the returns required by this act.

(SEC. 16.) The auditor of State, or any person appointed by him for that purpose, may put any question, in writing, he may deem

proper, to any officer, agent or receiver of any rail road company having any portion of its track in this State; and he may summon any officer, receiver or agent of such company to appear before him and testify, under oath, (which said auditor is authorized to administer) touching such rail road company's property, and the management and disposition thereof; and he may, by himself, or some person appointed by him, examine the books and papers of such company, in the hands of the company, or any of its officers, agents, or receivers; and all such officers, agents and receivers shall answer, under oath, all such questions as shall be put to them or either of them, by said auditor, or any person appointed by him for that purpose, relative to the condition, amount and value of said company's property, and the management or disposition thereof; and if any such officer, receiver or agent shall refuse or neglect to appear before said auditor, or the person appointed by him, or to answer any question put to him or them as aforesaid, or submit the books and papers aforesaid for examination, in manner aforesaid, he shall be deemed guilty of a misdemeanor, and upon indictment and conviction therefor, in the court of general sessions for any county
54 (which court shall have complete and full jurisdiction in all such cases) shall be fined in any sum, not exceeding five hundred dollars, and costs of prosecution, and confined in the jail of said county, until he answers all questions which may be put to him by the auditor of State, and until said fine and costs be paid.

(SEC. 17.) The auditor of State, treasurer of State, secretary of state, comptroller general and attorney general of the State, shall constitute a State board of equalization, (a majority of whom shall constitute a quorum for the transaction of business) who shall meet at the office of the auditor of State, at the capital, on the second Wednesday of November, annually, and equalize the value of the property of rail road companies whose roads are wholly or partially in this State, as returned to the auditor of State under the provisions of this act, by increasing the value of the roads and property of such companies as shall have been, in their judgment, returned at too low a valuation, and diminishing the values of such as may have been returned at too high a valuation. They shall keep a record of their proceedings, which shall be signed by all the members present, and deposited with, and kept by, the auditor of State; and a majority of the members present shall be competent to decide all questions which may come before said board.

(SEC. 18.) The auditor of State shall certify to the county auditor of each county in which any rail road, or part thereof, may be located, the valuations of rail road property in said county, as returned to him, with all additions made to, or deductions from, the valuation of the property of any rail road in said county by the State board of equalization; and the county auditor shall charge the rail road company in the several townships, cities and incorporated villages of their county, for taxation, with the valuations returned by

proceeding to do so, and to restrain them in such action is to restrain the State itself and is beyond the power of this court.

X. They deny on information and belief the eleventh paragraph of the petition.

XI. They admit that petitioner has refused to pay said taxes but deny that they are illegal or in violation of any contract rights whatever.

XII. They deny that there were any decrees of this court in the said cause either in 1870 or 1872 and demand strict proof thereof.

XIII. They further deny that the case of Thomas E. B. Pegues *vs.* Humphreys and others was on the merits but allege that is was decided without a trial on the facts conceded in the pleadings.

XIV. That at the time said Atlantic Coast Line Company alleged that it purchased the Cheraw and Darlington Railroad Company there was pending a suit on the part of the State of South Carolina against the said Cheraw and Darlington Railroad Company, and prior to that time the legislature of said State had passed an act to provide for the collection of past due railroad taxes, under which act said suit was brought.

31

XV. That these respondents are the attorneys for the State in the suit which has been brought before the rule and injunction herein served, and are the officers of the court of common pleas of Chesterfield county charged with the prosecution of said suit and the injunction against their prosecution thereof is an injunction in effect against a suit in a State court and the court has no jurisdiction to grant the same under the Revised Statutes of the United States.

Wherefore they pray that the temporary injunction be dissolved and they be hence dismissed with their reasonable costs.

G. DUNCAN BELLINGER,
Attorney General South Carolina.
STEVENSON & MATHESON.
J. M. SPEARS.
S. W. G. SHIPP.

I hereby certify that I am solicitor and of sounsel for the defendants in the foregoing cause, and that in my opinion the foregoing plea is well founded in point of law.

G. DUNCAN BELLINGER,
Attorney General of S. C., Solicitor and of
Counsel for Defendants.

32 UNITED STATES OF AMERICA,
District of South Carolina.

G. Duncan Bellinger, being duly sworn, deposes and says that he is one of the defendants named in the foregoing plea; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge.

G. DUNCAN BELLINGER.

Subscribed and sworn to before me this 22nd day of October, A. D. 1901.

[SEAL.] J. T. GANTT,
Notary Public for S. C.

33 Amendment to Return and Answer in Paragraph XVI.

Filed Jan. 19, 1903.

The respondents hereby amend their return by inserting in the same, after paragraph 15, the following as paragraph 16:

These respondents allege that they are informed and believe that the Atlantic Coast Line Railroad Company whatever rights it possesses in the premises under the Atlantic Coast Line Railroad Company of South Carolina which was chartered under the act of 1897, 22 Stat. S. S. at Large, 653, and acquired the Cheraw and Darlington railroad in the latter part of 1897 or early in 1898, and under the provisions of its charter it was prohibited from claiming any exemption from taxation which the Cheraw and Darlington railroad might have claimed.

34 EXHIBIT "A."

Agreement as to Admission of Facts Between W. F. Stevenson and J. T. Barron, Attorneys.

Filed Jan. 19, 1903.

SOUTH CAROLINA,
Chesterfield County.

In Common Pleas.

THE STATE OF SOUTH CAROLINA
vs.
THE CHERAW AND DARLINGTON RAILROAD COMPANY.

The attorneys on behalf of the plaintiff and defendant in the above case agree that the following are facts and are hereby admitted as facts for the purposes of the case, reserving the right to object to said facts being used in evidence in the case on the ground that they are not relevant or pertinent to the issues involved in the case, if either party sees fit to object.

I. It is admitted that the Cheraw and Darlington Railroad Company was organized and completed its road from Florence, S. C., to Cheraw, S. C., in December, 1855.

II. It is admitted that the railroad board of equalization or assessors have not valued or assessed, nor have the county auditors of Darlington or Chesterfield assessed not the county auditors of any

county entered the property on the books for taxation, nor have any returns thereof for taxation been made nor have penalties for non-return or non-payment been entered on any of the books for any of the years for which the suit for taxes has been brought, but the amounts assessed for expenses of the R. R. commission have been regularly charged and collected on the tax books.

III. It is admitted that the statement of the number of miles of road in each county as set forth in the complaint is correct.

IV. It is agreed that the answer be amended as follows: viz: In paragraph XII of the answer to the first cause of action and wherever the like averment appears in answer to the other causes of action of the complaint strike out after the words "taxation and" on
35 line 3rd of paragraph XII, the words on lines 3 and 4 "organized itself and built and completed its road," and on line 4th for the word "inserting" substituting the word "invested" and strike out the words "established and" so that the sentence will read "taxation and invested large sums of money in maintaining an important public highway &c."

March 30th, 1898.

W. F. STEVENSON,
For Plaintiff's Attorneys.
J. T. BARRON,
For Deft's Attorneys.

36 Notice of Motion that the Honorable Charles H. Simonton was Incapacitated to Hear Cause by Reason of Having Been Former Complainant's Counsel in Same.

Filed Jan. 19, 1903.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. J. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; J. M. McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw & Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: ATLANTIC COAST LINE RAILROAD COMPANY, &c.,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina, &c.

To J. T. Barron, Esq., Columbia, S. C.:

You will please take notice that upon the call of the above proceedings before his honor, the circuit judge, we will respectfully sug-

gest that the Honorable Charles H. Simonton, circuit judge, is incapacitated to hear and determine the motion pending in the above case, for the reason that he was formerly complainant's counsel in said cause.

October 22, 1901.

G. DUNCAN BELLINGER,
Attorney General S. C.
STEVENSON & MATHESON,
J. M. SPEARS,
S. W. G. SHIPP,
Attorneys for Respondents.

37

38 Order of Judge Simonton Transferring Cause to Some Other Judge.

Filed Oct. 25, 1901.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

In re THOMAS E. B. PEGUES, Complainant,
vs.
R. I. HUMPHREYS ET AL., Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, Petitioners,
vs.
G. DUNCAN BELLINGER ET AL., Respondents.

The attention of the circuit judge having been called to the fact that the firm of which he was a member appeared on the record in the case of Humphreys and Pegues, upon which the motion in this case is based, he has come to the conclusion that he ought not to sit any further in the case, the hearing of the rule to show cause, returnable this day, is therefore postponed. Counsel are at liberty to fix any other day which may suit the convenience of any judge of this court to hear the motion. They will therefore, if possible, agree upon such a day or take any other steps which they may deem advisable.

CHARLES H. SIMONTON,
Circuit Judge.

October 25, 1901.

to be therein named to be and appear before your honors in this honorable court then and there true, direct and perfect an-
61 swer make to all and singular the premises and to abide and perform such further order and decree in the premises as to your honors shall seem meet.

And your orator will ever pray and so forth.

SIMONTON & BARKER,
Complainant's Solicitors.

STATE OF SOUTH CAROLINA :

Personally appeared before me Theodore G. Barker, agent of the complainant in this said bill of complaint and says that the matters and things therein set forth, so far as they are within his own knowledge, are true; and so far as they depend upon the knowledge and information of others, he believes them to be true.

THEODORE G. BARKER.

Sworn to before me this fifth day of August 1870.

D. B. GILLILAND,
[L. S.] Notary Public.

Filed August 6, 1870.

62 Order of Injunction.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

THOMAS E. B. PEGUES
vs.
R. I. HUMPHREYS, JOHN MCCALLA, and THE CHERAW and Darlington Rail Road Company. } In Equity.

On hearing the bill and affidavit in this case, on motion of Simonton & Barker,

Ordered, that a writ of injunction do issue to R. I. Humphreys, county treasurer for Darlington county, and John McCalla, county treasurer for Chesterfield county, enjoining them and each of them from enforcing process for collection of any tax or assessment, charged by either of them against the Cheraw and Darlington Rail Road Company in their respective counties, and against the Cheraw and Darlington Rail Road Company, its officers and agents from paying such tax or assessment, until the further order of this court.

GEO. S. BRYAN,
U. S. Judge, Dist. S. C.

August 17, 1870.

Filed August 17, 1870.

63 Answer of Humphreys and McCalla.

Filed Jan. 19, 1903.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

THOMAS E. B. PEGUES
vs.
R. I. HUMPHREYS, JOHN MCCALLA, and THE CHERAW & DARLINGTON RAIL ROAD COMPANY.

The joint and several answers of R. I. Humphreys and John McCalla, citizens of the State of South Carolina, to the bill of complaint of Thomas E. B. Pegues, a citizen of the State of Mississippi.

I. R. I. Humphreys for himself says, that he is the county treasurer for the county of Darlington in the said State, and is by law charged with the duty of collecting the taxes laid under the laws of the said State upon the property within the said county.

II. These defendants further answering say, that it is true as set forth in the said bill of complaint that the said Cheraw and Darlington Rail Road Company is a body corporate by the laws of the said State, doing business therein under a charter conferred by an act of the General Assembly of the said State, and the amendments thereto, and that the property of the said corporation lying within the said State has been assessed for taxes in the manner set forth in the said bill of complaint, and under the authority of the act of the General Assembly of the said State entitled "An act to provide for the assessment and taxation of property," passed September 15th 1868, and set forth more particularly in the said bill of complaint, to which reference is hereby made.

64 III. That by the constitution of the said State in art. I, section 2, it is declared that "the property of corporations now existing or hereafter created shall be subject to taxation, except in cases otherwise provided for in this constitution, and that in article IX, section 1, of the said constitution it is further declared that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as shall be exempted by law, for municipal, educational, literary, scientific, religious or charitable purposes," and that saving and excepting these, no other exemptions are provided for in said constitution.

IV. That upon the adoption of the present constitution of the said State, and the pas-age of the said act hereinbefore named "to provide for the assessment and taxation of property" all exemption from taxation before granted to or claimed by the said Cheraw and Darlington Rail Road Company, was repealed and discontinued, and that thenceforth the said company became liable, and is now liable for taxation under the laws of the said State.

V. That no contract between the said Cheraw and Darlington Rail Road Company, and the said State has been violated by the assessment and taxation under existing laws of the property of the said Cheraw and Darlington Rail Road Company inasmuch as the right to repeal, modify or amend any previously existing exemption from taxation, has been and is at all times inherent and inextinguishable in the legislative authority of the said State.

VI. These defendants further answering say, that it is true as set forth in the said bill of complaint that by section 5 of an act of the General Assembly of the said State entitled "An act to alter and amend an act entitled "An act to provide for the assessment and taxation of property" passed February 28, eighteen hundred
65 and seventy, it is enacted that the collection of taxes shall not be stayed or prevented by any injunction, writ or order issued by any court or officer, except as provided in this act and in the act to provide for the assessment and taxation of property."

VII. That by the provisions of the 6th and 7th sections of the said act last above named, and also by the 81st section of the "Act to provide for the assessment and taxation of property" hereinbefore referred to, all of which are fully set forth in the said bill of complaint, and to which reference is hereby made, a full complete, adequate and convenient remedy at law is given for the recovery of taxes illegally assessed and collected upon any property within the said State, and that therefore this honorable court ought not to interfere by its writ of injunction to stay the collection of the taxes laid upon the property of the said Cheraw and Darlington Rail Road Company, and that the said company is not aggrieved nor in any manner wronged by the laying and collection of the said taxes, and is entitled to no relief therefrom at the hands of this honorable court.

Wherefore these defendants having now made all needful answer to the said bill of complaint, pray to be hence dismissed with their costs.

D. H. CHAMBERLAIN,
Attorney General of the State of
South Carolina, for Defendants.

STATE OF SOUTH CAROLINA,
Richland County.

Personally appeared before me D. H. Chamberlain, att'y gen'l of of the said State, and says that the matter- and things set forth in the

foregoing answer to the bill of complaint of Thomas E. B. Pegues, so far as they are within his own knowledge are true, and so far as they depend upon the knowledge and information of others,
66 he believes them to be true.

D. H. CHAMBERLAIN.

Sworn to before me this 14th day of September A. D. 1870.

M. J. CALNAN,
Notary Public.

Replication.

Filed Jan. 19, 1903.

In the United States Court, Fourth Circuit. In Equity.

THOMAS E. B. PEGUES
vs.
R. I. HUMPHREYS ET AL.

These repliants saving and reserving to themselves all and all manner of advantage of exception which may be had or taken to the manifold uncertainties and insufficiencies of the said defendants' — for replication thereto say, that they do and will aver maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is uncertain, evasive and insufficient in law to be repealed to by these repliants; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto by these repliants and not herein and hereby well and sufficiently replied unto confessed or avoided traversed or denied is true. All which matters and things these repliants are ready to aver maintain and prove as this honorable court shall direct and humbly pray as in and by their said bill they have
67 already prayed.

SIMONTON & BARKER,
Complainant's Solicitors.

Filed Sept. 17, 1870.

68 Answer of Cheraw & Darlington R. R. Co.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
District of South Carolina.

THOMAS E. B. PEGUES, a Citizen of Mississippi,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, ET ALS.

The Separate Answer of The Cheraw and Darlington Rail Road Company, One of the Defendants, to the Bill of Complaint of Thomas E. B. Pegues, Complainant.

This defendant saving all right of excepting to said bill for answer to so much thereof as it is advised is material answering says:

It admits that complainant is a stockholder as he alleges in said company. That this defendant is a body corporate as stated under the charter which is correctly set forth in the bill.

That the charter of the North Eastern Rail Road Company and the amendment thereto are also correctly described and it is true that the acts of the legislature including the grant of exemption from all taxation were accepted by this defendant and upon the faith of said contract the rail road was completed and equipped and the company has been doing business to the great benefit of the public as a highway since the date of its organization.

That the entire capital stock including the shares owned by the complainant were originally paid up and large amounts of money were borrowed from various persons in and beyond the limits of South Carolina by the corporation for the purpose of completing the enterprise and upon the faith and assurance of the contract on the part of the State of South Carolina by which the corporation was exempted from all taxation.

69 This defendant admits that under the act of the General Assembly passed A. D. 1868 and the act of 1870, which are correctly set forth in the bill, the State auditor as stated in disregard of the protest of this defendant has certified the valuation of the property of the Cheraw and Darlington Rail Road Company made and apportioned, under said act, to the several county auditors who have respectively charged the said rail road company in their several counties.

That said valuation amounts as defendant is informed to the sum of four hundred thousand dollars, and the amounts charged by the several county auditors for taxation sum up the total amount of tax of — dollars besides penalties and costs.

This defendant admits that it has been notified by the county

treasurers that executions will be enforced against the property of the company in their respective counties in case the taxes and penalties and costs are not paid.

This defendant admits that it has been advised by counsel learned in the law that no measures could be adopted by it to resist the demand for said taxes or prevent a sale of the property of the company under said executions.

And this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THEODORE G. BARKER,
Attorney for Cheraw and Darlington Rail Road Company.

Filed Sept. 19, 1870.

70 Order Making Injunction Perpetual.

Filed Jan. 19, 1903.

United States Circuit Court, South Carolina District, Fourth Circuit.
In Equity.

THOMAS E. B. PEGUES, a Citizen of Mississippi,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, ET ALS.

Hearing the pleadings in this cause on motion of Simonton & Barker, solicitors for complainant,

Ordered, that the injunction heretofore granted be continued and the same is hereby made perpetual.

GEO. S. BRYAN,
U. S. Judge, Dist. S. C.

April 27, 1871.

Filed Ap'l 27, 1871.

71 Petition and Allowance of Appeal.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
South Carolina District, Fourth Circuit. In Equity.

THOMAS E. B. PEGUES, a Citizen of the State of Mississippi,
vs.
THE CHERAW AND DARLINGTON RAILROAD COMPANY, R. I. Humphrey, and John McCalla, Citizens of the State of South Carolina.

To the honorable the judges of the circuit court for the district aforesaid:

The humble petition of R. I. Humphrey and John McCalla, showeth:

1. That by the decree dated the 27th day of April A. D. 1871, in

the above mentioned cause, it was ordered that the decree of injunction theretofore granted restraining your petitioners from proceeding to enforce the collection of the taxes levied on the property of the said Cheraw and Darlington Railroad Company &c., be made perpetual.

2. That the said order, dated as aforesaid, is, as your petitioners are advised and submit, erroneous, and the same ought to be reversed.

Your petitioners, therefore, humbly pray that they may be allowed an appeal from the said decree to the Supreme Court of the United States.

D. H. CHAMBERLAIN,
Solicitor for Petitioners.

D. T. CORBIN, Of Counsel.

Appeal allowed as prayed for.
By the court.

[SEAL.]

DAN'L HORLBECK,
C. C. C. U. S., Dist. S. C.

July 10, 1871.

72 Summons to Cheraw and Darlington Railroad Company to Become Party to Appeal.

Filed Jan. 19, 1903.

THE UNITED STATES OF AMERICA,
South Carolina District, Fourth Circuit. In Equity.

The President of the United States of America to the Cheraw and Darlington Railroad Company:

You are hereby summoned to be and appear before the judges of the Supreme Court of the United States at the Capital at Washington on the first Monday of December next, then and there to join with R. J. Humphreys and John McCalla in prosecuting an appeal from the decree of this court granting a perpetual injunction against you and the said R. J. Humphreys and John McCalla on the complaint of Thomas E. B. Pegues.

And also that you do, within thirty days from the service, file or cause to be filed with the clerk of the circuit court for said district, a notice of severance if you do not desire to be joined with the said R. J. Humphreys and John McCalla as an appellant in the prosecution of the said appeal.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States of America, at Charleston, in said South Carolina district, the tenth day of April, 1871, and in the ninety-fifth year

of the Sovereignty and Independence of the United States of America.

D. H. CHAMBERLAIN,
For Appellants.
D. T. CORBIN, Of Counsel.

Teste:
DAN'L HORLBECK,
[SEAL.] C. C. C. U. S. for S. C.

We acknowledge service this 7th day of June, 1871.
SIMONTON AND BARKER.

73 Notice of Severance on Appeal.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA,
South Carolina District, Fourth Circuit.

In the Circuit Court.

THOMAS E. B. PEGUES
vs.
R. I. HUMPHREYS ET AL.

The Cheraw and Darlington Rail Road Company one of the defendants in the above entitled cause upon whom citation has been served to join with R. I. Humphreys and others, appellants, in prosecuting an appeal from the decree of the circuit court of the United States for the district aforesaid in the above entitled cause hereby file in said circuit court their notice that they are content with the decree of the circuit court and do not appeal therefrom and do hereby sever from their co-defendants on said appeal.

THEODORE G. BARKER, Solicitor.

Filed July 5, 1871.

74 Waiver of Security on Appeal.

Filed Jan. 19, 1903.

R. I. HUMPHREY and JOHN MCCALLA, Appellants,
vs.
THOMAS E. B. PEGUES, Appellee.

The appellee hereby consents that the appellants may appeal to the Supreme Court of the United States from the decree entered in the case of Thomas E. B. Pegues against R. I. Humphrey, John McCalla and the Cheraw and Darlington Railroad Company on the 27th day of April 1871, without security.

SIMONTON & BARKER,
Att'ys for Appellee.

75 Citation on Appeal.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA, *ss:*

To Thomas E. B. Pegues, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein R. I. Humphrey and John McCalla, are appellants and you are appellee, to show cause if any there be, why the decree in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal this 10th day of July, A. D. 1871, in the year of our Lord one thousand eight hundred and seventy one.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

Service acknowledged, July 11, 1871.

SIMONTON & BARKER,
Att'y for Appellees.

76 Mandate.

Filed Jan. 19, 1903.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of South Carolina, Greeting:

Whereas, lately in the circuit court of the United States for the district of South Carolina before you, or some of you, in a cause between Thomas E. B. Pegues, complainant, and The Cheraw and Darlington Railroad Company, R. J. Humphrey and John McCalla, defendants, wherein the decree of the said circuit court, entered in said cause on the 27th day of April, A. D. 1871, is in the following words, viz:

"Hearing the pleadings in this cause, on motion of Simonton and Barker, solicitors for complainant, ordered that the injunction heretofore granted be continued, and the same is hereby made perpetual."

As by the inspection of the transcript of the record of the said

circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by R. J. Humphrey and John McCalla agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and seventy-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs; and that the said complainant, Thomas E. B. Pegues, recover against the said defendants twenty dollars for his costs herein expended and
77 have execution therefor.

MARCH 10, 1873.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy two.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the mandate of said Supreme Court issued in the case of R. I. Humphrey, *et al.*, appellants, *vs.* Thomas E. B. Pegues, No. 124 December term 1872.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 4th day of March, A. D. 1898.

[SEAL.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Filed March 15, 1898.

78 Copy Petitions to Railroad Board of Assessors.

Filed Jan. 19, 1903.

CHERAW, S. C., May 25th, 1900.

To the board of railroad assessors:

By virtue of the petition of E. T. King county supervisor of Chesterfield county and the statute of February 19th, 1900 you are called

such company or companies, after adding thereto or deducting therefrom the amounts directed by the auditor of State.

(SEC. 19.) If any rail-road company, or its officers, shall fail
55 to make the returns to the auditor of State required by this act, on or before the twentieth day of October, annually, the State board of equalization shall proceed to ascertain the value of said company's road and property, according to the principles prescribed in this act, from the best information they can conveniently *obtain, and add thereto fifty per centum as penalty, and apportion* the same to the several counties, townships, cities and incorporated villages, through or into which said road or any part thereof may be located. And the State auditor shall certify the same to the several county auditors, who shall place the same on their duplicates for taxation, and if any such company or its officers, shall fail to make the return to any county auditor required by this act. the State auditor shall ascertain the amount properly chargeable to such company in said county, and certify the same to the proper county auditor, adding ten dollars thereto as penalty, (the whole of which penalty shall be paid into the State treasury); and the county commissioners shall charge such company, in the proper municipalities, with the taxes on the value so certified by the State auditor, and charge said company on the duplicates separately, with said ten dollars, without charging any taxes thereon; and the county treasurer shall pay the same into the State treasury, at his first annual settlement after the collection thereof.

7. That subsequently, by an act approved the 28th February 1870, entitled "An act to alter and amend an act entitled "An act to provide for the assessment and taxation of property," the legislature did, in section 5 of said act, declare that the collection of taxes shall not be stayed or prevented by any injunction, writ or order issued by any court or officer, except as provided in this act, and in the "act to provide for the assessment and taxation of property aforesaid."

And in the same act it is further provided as follows, by section
6: "Whenever any person or persons charged with taxes
56 upon the books of any tax collector in this State, shall state in writing, to said collector, that he or they have been erroneously or illegally charged with the same, the said collector shall submit to the county auditor a full statement of the facts in the case, which statement shall be forwarded to the State auditor, with such additional information relating thereto as the said county auditor may be able to give; and said tax collector shall not be required to proceed against the party or parties so claiming to have been erroneously or illegally charged with taxes, by distress or otherwise, until the State auditor shall, in writing, direct him so to do." And by section 7, "In any action or proceeding against any tax collector in this State, for the purpose of recovering any property or money alleged to have been erroneously or illegally assessed and collected, the party bringing such action or proceeding shall

make it appear that a notice in writing of the claim on which suit may be brought was given to said tax collector, in pursuance of the sixth (6) section of this act; and unless it shall be made to appear that said collector has proceeded contrary to the provisions of this act, the amount recovered in such suit shall not exceed the value of the property or money aforesaid."

8. That by the 81st section of the same act passed at the special session in 1868, it was also provided that, "if any taxes charged on any *real estate be regularly paid, and such real estate be erroneously* returned delinquent, and sold for such taxes, the sale shall be totally void; or if any taxes shall be illegally assessed and collected, when the same shall become known to the county auditor, he shall, on demand of the party interested, submit the matter to the auditor of the State; and if the auditor of State approve thereof, in writing, the amount paid by the purchaser at such void sale, or the amount so illegally collected, shall be repaid to the party paying the same, out of the county treasury, on the order of the county auditor, and so much of said taxes as shall have been paid into the
57 State treasury shall be refunded to the county treasury, and the county auditor shall retain the same in his next annual settlement, and charge the State therewith."

That the State auditor claiming to act under said last mentioned act of the legislature and disregarding the protest of the Cheraw and Darlington Rail Road Company as well as the contract obligation by which the State is bound by its grant to said company of an exemption from taxation as above recited, has certified the valuation of the property of said company made and apportioned under said act to the several county auditors who have respectively charged the said rail road company in their several counties for taxation.

9. That by the 35th section of said act of 1868, "it is declared that the county treasurer may enforce the collection of any tax or penalty assessed under this act at any time after the same becomes due, by distraint, attachment or other legal proceedings instituted in his name as such treasurer; and in case of his death or retirement from office before the collection of such taxes or penalties, his successor in office or subsequent treasurer, may be made a party to such proceedings and prosecute the same to final judgment and execution."

That R. I. Humphrey, county treasurer for Darlington county and John McCalla, county treasurer for Chesterfield county, have notified the Cheraw and Darlington Rail Road Company that if the tax is not paid on the property of the said company in said counties in which the road is located, execution will be enforced against the property of said company.

10. That the said Cheraw and Darlington Rail Road Company, as your orator is informed, is unable by any proceedings, permitted to be issued out of the courts of this State, to protect the property of the corporation, which is the property of its stockholders, from the

great wrong and injury, with which it has been threatened, and which is now about to be enforced.

58 That by the 6th section of the act approved 28th February 1870, it is positively declared that the collection of taxes shall not be stayed or prevented by any injunction, writ, or order, issued by any court or officer, except as provided in this act, or the act of the special session of 1868.

That by the 6th section of the act approved 28th February 1870, the power is reserved to the State auditor, to decide whether the tax complained of as erroneous or illegally charged, shall be collected. That if the State auditor shall decide that such taxes have not been erroneously or illegally charged, no injunction, writ or order of any court, shall stay the collection of said tax. That in section 7 of the act of 28th February 1870, a remedy is professed to be given by an action against the tax collector, but it is wholly uncertain and inadequate. In section 8 of the same act, it is provided that the judgment, if recovered in such suit, shall be paid in the manner provided in the 81st section of act passed at the special session of 1868. And the 81st section so referred — contemplates no payment in any case, unless the auditor of the State shall approve thereof in writing. That this judicial power is taken from those to whom, under the constitution of the State, it is committed; the exercise of it by them, in certain cases, prohibited; and that power and the exercise of it transferred to the State auditor.

11. That thus while all protection is denied to the Cheraw and Darlington Rail Road Company, against the collection of the tax, although illegal, no certain adequate relief at law can be had for the recovery of the same, although illegally collected, unless the State auditor shall assent thereto.

That your orator having been informed of the tax assessed and payment of which is to be enforced on the property of the said Cheraw and Darlington Rail Road Company, applied to the president and directors of the said company to resist the same.

12. That they informed your orator they had no means
59 with which to resist the collection of the said tax. That the act of 1870 had taken from them the right hitherto enjoyed by any corporation within or citizen of the State, to submit to the courts of the State, the question of the legality of a tax about to be enforced. And that such right was now denied to the Cheraw and Darlington Rail Road Company, and that under such circumstances they did not know what opposition they could make to the collection of the said tax.

That when forced to pay the same, they did not know what measures they could adopt to recover back the money, if paid, or their property if sold. That as they were advised if they had any remedy whatever, it was an action against the tax collectors, but that when repayment of money was ordered to be made by these officials, they were officers not able to respond to the payment of so large an amount. But that moreover the act did not even contemplate or

allow a recovery against these officers, so that a judgment would affect them personally. For if a verdict was had against them, other legislative enactments professed to provide a mode in which the judgment should be satisfied; but that such mode was uncertain in all respects and wholly inadequate to secure to the Cheraw and Darlington Rail Road Company the repayment of the money if paid, or the recovery of its property if sold. That no repayment of money or recovery of property, could be had under any circumstances, unless the State auditor directed it, and if he would direct it, a matter most improbable after he had decided that it should be assessed, it would then still remain for the State to decide, whether the money should be paid back if the money had been paid, or the property restored if the property had been sold.

That this matter rested in the pleasure of the State, as the State could not be sued. And thus no certain or adequate means existed for the repayment of the money, although illegally collected, or the recovery of the property if illegally sold.

13. The president and directors of said Cheraw and Dar-
60 lington Rail Road Company having failed and being power-
less, by the laws of the State to resist the assessment and enforcement of said tax, unlawfully imposed upon the property of the company. Your orator is exposed, together with all other stockholders in said company to great wrong and damage, and have no adequate relief in the premises in any other jurisdiction save in a court of equity and through the process of injunction to restrain the unconstitutional and illegal action of the officers of the State of South Carolina.

14. To the end therefore that the several parties above named, as defendants, may full, true and perfect answer make to the premises, that the said R. I. Humphrey, county treasurer for Darlington county and John McCalla, county treasurer for Chesterfield county, may be restrained and enjoined from proceeding in each of their several counties for which they are county treasurers by execution or other process of any kind from enforcing the payment of the taxes so in each county charged upon the assessment made of the value of the property of the Cheraw and Darlington Rail Road Company in such county.

That the Cheraw and Darlington Rail Road Company may be restrained and enjoined from the payment of any or all of the taxes so demanded by the said county treasurers.

May it please your honors to grant unto your orator not only your writ of injunction to be directed to the said R. I. Humphrey, treasurer for Darlington county, John McCalla, treasurer for Chesterfield county, and the Cheraw and Darlington Rail Road Company, their and its officers, agents and attorneys from doing or causing to be done all or any of the matters and things hereinbefore complained of, but also your writ of subpœna directed to the said R. I. Humphreys, John McCalla and the Cheraw and Darlington Rail Road Company, commanding them on a day certain and under a penalty

which is "taxable" can be legally the subject of "return" for taxation, or the subject for assessment, and therefore that the language of section I of the act of 1900, viz: "That when railroad property has not been returned nor assessed for any year and was not pur on the tax books for such year or years, and no taxes were paid thereon, and more than a year has elapsed since taxes for such years, if assessed at the proper time, would have become due" cannot be made to apply to the property of the Cheraw and Darlington Railroad Company, which is judicially declared to have been non-taxable, and therefore not returnable or the subject of a return for taxation or assessment, or liable to be put on the tax books or for payment of taxes, in any year between 1863 when it was exempt, and 1898 when its exemption was surrendered by the Atlantic Coast Line Railroad Company in South Carolina to the State and accepted by the State.

(4.) Respondents further submit that in addition to what is above shown the seventh section of the act of 19th February 1900 expressly provides as follows:

"SEC. 7. The provisions of the act shall not apply to any railroad property which may be adjudged by the courts to be exempted by law from the taxes which hereafter may be assessed against it under this act."

The language of this section it is submitted is equivalent to an express exception from the provisions of the act of the property of the Cheraw and Darlington Railroad Company, which has been finally and solemnly adjudged in an issue made between the State and the said company to be exempt by law from all taxes.

(5.) Respondents submit that the burden of showing that
85 the property of the Cheraw and Darlington Railroad Company by law in 1899, 1890, 1891, 1892, 1893, 1894, 1895, 1896 and 1897 was taxable and within the terms of act of 19th February 1900 rests upon the petitioner and supervisor of Chesterfield county and that this should be shown to the complete satisfaction of the State board of railroad assessors before your honorable body can be persuaded to act in derogation of the adjudged rights of the Cheraw and Darlington Railroad Company or its successors and in contempt of the injunction of the supreme and circuit courts of the United States.

Respectfully submitted,
J. T. BARRON,
Counsel for A. C. L. R. R. Co., with Whom was
THEO. G. BARKER.

86 Statement of Counsel as to Action Brought in said Court and Sought to be Enjoined.

Filed Jan. 19, 1903.

The complaints in the actions sought to be enjoined were as follows:—on thirty causes of action—exactly similar except in dates and amounts, so that only one cause of action is here set out:—

87 Copy of First Cause of Action in Complaint Sought to be Enjoined.

Filed Jan. 19, 1903.

STATE OF SOUTH CAROLINA,
County of Chesterfield.

In Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,
vs.
THE CHERAW AND DARLINGTON RAILROAD COMPANY and THE Atlantic Coast Line Railroad Company, Defendants.

The complaint of the above plaintiff shows—for a first cause of action.

I. That the defendants are corporations created and existing under the laws of South Carolina and doing business within said State.

II. That the Cheraw and Darlington Railroad Company owned a railroad consisting of road bed, right of way, track, depots, water tanks, cars, engines and general railroad equipments and franchise in the fiscal year beginning November 1, 1888, twelve 55/100 miles in length of the value of six thousand dollars per mile in the county of Chesterfield.

III. That the same was not returned for taxes and had not been on the books, nor had it paid taxes for that year, and more than a year had elapsed since it should have paid taxes if they had been properly charged at the right time, and under the authority given by the act of the General Assembly of 1900, entitled "An act to provide for the assessment for taxation of railroad property which has been off the tax books, for the years which they have been off the books and to fix the time when such taxes shall become due, and for the collection thereof," the railroad board of assessors were convened in extra session in the early part of the year 1900 by the
88 secretary of state, on proper petition filed for the purpose of fixing the value of said property for taxation for the fiscal year beginning November 1st, 1888, and the nine years subsequent thereto, and they fixed the value of said road for the fiscal years aforesaid at six thousand dollars per mile, and such value was duly certified to the county auditor of said county, and the same was duly entered in the tax books of that year and the taxes were properly charged under the levies provided by law for that year, and a certified statement was furnished the treasurer of said county for that year of the taxes charged thereon.

IV. That the value of said property as thus fixed was $75,300.00 and by the act to raise supplies for that year the rate of tax levied and directed to be levied was in the aggregate, including the consti-

tutional school tax 14½ mills and the said sum was levied upon said assessed value amounting to the sum of $1,073.02 *dollars* and the same became a just charge upon the said property as soon as the assessment was made and the levy entered pursuant to the same.

V. That on the 10th, day of November, 1900, the treasurer of said county demanded of the agent of the Atlantic Coast Line Railroad Company which company was then and still is in possession of the property formerly owned by the Cheraw & Darlington Railroad Company, having acquired the same by consolidation with said Cheraw & Darlington Railroad Company, payment of said taxes and payment thereof was refused, and more than sixty days have elapsed since such demand and the payment of said taxes is still refused.

VI. That said sum had been legally assessed and levied under the laws of this State and is due and owing to the plaintiff.

89 Extract from Revised Statutes of South Carolina, 1893, Embracing Sections 233 to 242, in Relation to Assessment of Railroad Property.

Filed Jan. 19, 1903.

The provisions of the Revised Statutes of South Carolina, 1893, relating to assessments and returns of railroad companies *was* as follows:

Article VI.

Special Rules as to Returns and Assessments of Railroad, Express, Telegraph, and Insurance Companies, and Provisions as to Other Corporations.

Sec. 233. Railroads and like companies to return property in use as personalty; lien for taxes; return, when and where made.

Sec. 234. Railroad companies; annual returns to comptroller general; how made and what to contain.

Sec. 235. The same; annual returns to county auditors; what to embrace.

Sec. 236. How value of railroad property fixed and apportioned.

Sec. 237. Comptroller general prescribes forms of return and oath.

Sec. 238. Receiver makes returns when road in his hands.

Sec. 239. Comptroller general's powers relative to returns and investigation touching same.

Sec. 240. State board of assessors; who constitute; annual meeting and proceedings.

Sec. 241. Comptroller general certifies action of board to county auditors, who conform their duplicates thereto.

Sec. 242. Where railroad company fails to make returns, board to ascertain value and add penalty; result certified to auditors.

90 "SEC. 233. The road bed, right of way, station buildings, toll houses, structures, tools, machinery, poles, wires, fixtures, vessels, and real estate, owned and necessarily in daily use by any railroad, turnpike, plank road, bridge, telegraph, canal, or slack-water navigation company, in the prosecution of its business, shall, for the purposes of this chapter, if the company be organized in this State, be treated as personal property. But the lien, for taxes, shall attach to the property as if the same were real property, and the president, secretary, or principal accounting officer thereof, shall include the value thereof in the return of the other personal assets of such company for taxation; which return shall be made in the month of January, or before the twentieth of February, annually, to the several auditors of the counties in which such road, canal bridge, telegraph line, or slack-water navigation company may be situated, according to the value of such property in each, together with a statement of the amount of such assets situate in each city, town, village, or ward in said counties, respectively; and the value of the movable assets of such company shall be apportioned to each town, city, ward, or village, in proportion to the value of the road bed, canal, slack-water navigation, bridge, or telegraph line in each."

"Railroad held not liable for taxes, when exempt by its charter, as against bonds having first statutory lien thereon.—Hand *v.* R. R. Co., 17 S. C., 219. An assessment to pay expenses of railroad commissioners valid.—C. C. & A. R. R. Co. *v.* Gibbes, 24 S. C., 60; *ib.*, 27 S. C. 385; 4 S. E., 49."

"SEC. 234. The president and secretary of every railroad company whose track or road bed, or any part thereof, is in this State, shall annually, between the first of January and twentieth of February, return to the comptroller general, under their oaths, the total length thereof in each county, city, town and incorporated village in this State; the total length of their double track in this State, and the length thereof in each county, town, city, and incorporated village of this State; the total length of all their side tracks, and
91 the length thereof in each city, county, town and incorporated village in this State; the location and value of all their shops, depots, grounds, station houses, wood and water stations, buildings, stationary engines, tools, implements, and fixtures in South Carolina, and all other real estate necessary to the daily running operations of the road; the number and value, each, of all their locomotive engines, passenger, freight, platform, gravel, construction, hand, and other cars; the value of their moneys and credits; the total value of the entire road, appurtenances, and equipments, and the total value of said road in South Carolina, with its appurtenances and equipments."

"SEC. 235. The president and secretary of every railroad company mentioned in the preceding section shall also, annually, between the first of January and the twentieth of February, return to the county auditor of each county in South Carolina through or into which such road, or any part thereof, may be located, a statement of the

value of said road, and the property of the company in said county, and in each of the towns, cities and villages of said county through or into which said road, or part thereof, is located, in the manner and form required by this chapter in the return to the comptroller general."

"SEC. 236. In ascertaining the value of the road and property of any railroad company, the value of the right of way, bed and track of the whole road shall be fixed, and such value apportioned pro rata to each mile of the main track; and to the value of the number of miles of main track in each town, city and incorporated village of each county in this State through and into which said road is located, shall be added the value of the real estate, fixtures, stationary engines, tools, implements, machinery and other stationary property *property* provided for use in the daily operations of the road, situate in said town, city, or village; and the total value of the rolling stock, moneys and credits shall be apportioned pro rata to each mile of the main track of said road, and the amount thereof, according to the number of miles of main track in each town, city and village in this State, added to the value of the main track in
92 such town, city and village, respectively; and the aggregate value of said road and property in this State, and in each county, city, town and incorporated village of this State, through or into which said road is located, shall be stated in said return."

"SEC. 237. The return and oath required of officers of railroad companies shall be made in such form as shall be prescribed by the comptroller general."

"SEC. 238. If any railroad, its appurtenances, equipments, and property of any kind soever, shall be in the hands of a receiver or other officer, such receiver or other officer shall make the returns required by this chapter."

"SEC. 239. The comptroller general, or any person appointed by him for that purpose, may put any question, in writing, he may deem proper, to any officer, agent or receiver of any railroad company having any portion of its track in this State; and he may summon any officer, receiver or agent of such company to appear before him and testify, under oath (which oath said comptroller general is authorized to administer), touching such railroad company's property, and the management and disposition thereof; and he may, by himself, or some person appointed by him, examine the books and papers of such company, in the hands of the company, or any of its officers, agents or receivers; and all such officers, agents and receivers shall answer under oath, all such questions as shall be put to them, or either of them, by said comptroller general, or any person appointed by him for that purpose, relative to the condition, amount and value of said company's property and the management or disposition thereof."

"SEC. 240. The treasurer of the State, secretary of state, comptroller general and attorney general of the State, and the chairman of the board of railroad commissioners of this State, shall constitute

a State board of assessors, a majority of whom shall constitute a quorum for the transaction of business, who shall meet at the office of the comptroller on the second Wednesday of May, annually, or as soon thereafter as the comptroller general shall notify said
93 board that the returns of the several railroad companies have been filed in his office, and shall determine and assess the value of the property of railroad companies whose roads are wholly or partially in this State, returned to the comptroller general under the provisions of this chapter, increasing the value of the road and property of such company or companies as shall have been, in their judgment, returned at too low a valuation, and diminishing the values of such as may have been returned at too high a valuation. They shall keep a record of their proceedings, which shall be signed by all of the members present, and deposited with and kept by the comptroller general; and a majority of the members present shall be competent to decide all questions which may come before said board."

"SEC. 241. The comptroller general shall certify to the county auditor of each county into which any railroad, or part thereof, may be located, the valuations of railroad property in said county as determined and assessed by the State board of assessors, with all additions made to or deductions from the valuation of the property of any railroad company in said county by the State board of assessors; and the county auditor shall charge the railroad company or companies in the several cities, towns, townships and incorporated villages of their county, for taxation, with the valuations determined and assessed by the State board of assessors."

"SEC. 242. If any railroad company, or its officers, shall fail to make the returns to the comptroller and to each county auditor in each county in which such railroad, or part thereof, may be located, as herein required, on or before twentieth day of February, annually, the State board of assessors shall proceed to ascertain the value of said companies' road and property, according to the principles prescribed herein, from the best information they can conveniently obtain, and add thereto fifty per centum as penalty, and apportion the same to the several counties, towns, townships, cities any incor-
94 porated villages through or into which said road, or and part thereof, may be located, and the comptroller general shall certify the same to the several county auditors, who shall place the same on their duplicates for taxation."

95 Decree.

Filed 19 January, 1903.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer for Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General for the State of South Carolina; Stevenson and Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina; J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

In the year 1870 Thomas E. B. Pegues a citizen of the State of Mississippi was a stockholder of the Cheraw and Darlington Railroad Company, a corporation created by an act of the General Assembly of the State of South Carolina and owning a railroad extending from the town of Florence in (what was then the county
96 of Darlington and now) the county of Florence through a part of said Darlington county and a part of said Chesterfield county to the town of Cheraw in Chesterfield county in said State—all of the property of said company being within the said two counties.

On the 6th day of August 1870, said Pegues, as such stockholder, brought his bill of complaint in the circuit court of the fourth circuit for the district of South Carolina against the tax collectors of the State of South Carolina for said counties and against said company alleging *inter alia*, that said Cheraw and Darlington Railroad Company was made a body corporate by act of the General Assembly of the State of South Carolina passed the 19th day of December A. D. 1849—that section five of said act was (by an act passed 17th December 1863) amended so as to read as follows, to wit: "That all the powers rights and privileges granted by the charter of the North-

eastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company; * * *" and it was also provided in said act (A. D. 1863 sec. III) "that this charter shall in no wise be subject to the provisions of the forty-first section of the act of assembly of South Carolina passed the seventeenth day of December in the year of our Lord one thousand eight hundred and forty one."

For a proper understanding of this last enactment the act of 1841 is quoted as follows, viz: Preamble.—"An act to incorporate certain villages societies and companies * * * and to establish the principles on which charters of incorporations will hereafter be granted. * * *"

"SECTION XII. * * * That it shall become part of the charter of every incorporation, which shall at the present or any succeeding session of the General Assembly receive a grant of a charter or any renewal amendment or modification thereof (unless the act granting such charter renewal amendment or modification shall in express terms except it) that every charter of incorporation granted renewed or modified shall at all times remain subject to amendment alteration or repeal by the legislative authority."

97 It was further alleged, that, "by the terms of the charter of the North Eastern Railroad Company, A. D. 1855 it was declared as follows, viz:

"SEC. L. That the stock of the North Eastern Railroad Company that it now owns or may hereafter acquire which is connected with or subservient to the works authorized in the charter of said company shall be and the same is hereby exempted from all taxation during the continuance of the present charter of the said company."

It was claimed in said bill by complainant Pegues "that the exemption from taxation granted by the State of South Carolina to the North Eastern Railroad Company by amendment of its charter in 1855 constitutes a part of the powers rights and privileges secured to the Cheraw and Darlington Railroad Company by the above recited act of assembly A. D. 1863, and that the acceptance thereof by the company constitutes a contract between the State of South Carolina and the stockholders of said company" and that the express exception from the provisions of the 41st section of the act of 1841, contained in the amended charter (A. D. 1863 sec. III) of the Cheraw and Darlington Railroad Company, secured to that company and its stockholders a complete and perpetual exemption of its property from all taxation by the State, and her tax officers, beyond the power of repeal by any subsequent legislature.

The bill in that case sets forth the act of assembly of South Carolina of 1868 "providing for the assessment and taxation of property" and the special provision of the act of 28th February 1870 amending the act of 1868 as follows: which (in sec. 5) declared that "the collection of taxes shall not be stayed or prevented by any injunction suit or order issued by any court or officer except as provided in this act. * * *

It was further alleged by complainant that the State tax officials

had proceeded under said act to charge the property of the
98 Cheraw and Darlington Railroad Company with taxes against the protest of said company claiming its exemption by contract with the State of South Carolina and that the defendants named in the bill, viz: R. J. Humphreys the then county treasurer for Darlington county and John McCalla the then county treasurer for Chesterfield county had notified the Cheraw and Darlington Railroad Company that if the tax is not paid on the property of the said company in said counties in which the road is located execution will be enforced against the property of said company.

It further alleged in said bill "that the said Cheraw and Darlington Railroad Company is unable by any proceedings permitted to be issued out of the courts of this State to protect the property of the corporation, which is the property of the stockholders, from the great wrong and injury with which it has been threatened and which is now about to be enforced."

Complainant therefore prayed a writ of injunction against said tax officials representing the State from proceeding by execution or other process of any kind from enforcing the payment of the taxes so charged, and also against the Cheraw and Darlington Railroad Company from the payment of all or any of the taxes so demanded.

Thereafter on the 17th August 1870 the judge of the circuit court of the fourth circuit for the district of South Carolina ordered an injunction to issue in accordance with the prayer of the bill and until the further order of the court.

On the 14th September A. D. 1870 the Honorable D. H. Chamberlain the then attorney general of the State of South Carolina appeared in the said circuit court for the tax officials of the State and filed their answer to said bill of complaint admitting the official character of defendants, the incorporation of the Cheraw and Darlington Railroad Company under its charter and the amendments thereto and that the property of said corporation lying within the said State had been assessed for taxes in the manner set forth in the bill of complaint.

99 The answer set forth the provisions of article first section 3 and article IX section I of the then constitution of the State and claimed that thereunder and upon the passage of the act to provide for the assessment and taxation of property all exemption from taxation heretofore granted to or claimed by the Cheraw and Darlington Railroad Company was repealed and discontinued and that thenceforth said company became liable and is now liable for taxation under the laws of the said State.

The answer further claimed:

"V. That no contract between the said Cheraw and Darlington Railroad Company and the said State has been violated by the assessment and taxation under existing laws of the property of the Cheraw and Darlington Railroad Company inasmuch as the right

to repeal modify or amend any previously existing exemption from taxation has been and is at all times inherent and inextinguishable in the legislative authority of the said State."

It was also claimed that complainant under the provision of the State laws had a complete and adequate remedy at law.

The Cheraw and Darlington Railroad Company also answered—admitting the case made by the bill and its inability to resist the demand for said taxes or to prevent a sale of the property of the company under executions under the State laws.

On the 17th. September 1870 complainant filed his replication and on the issues so made and joined the case was heard in the said circuit court, and, on the 27th. April 1871, it was "ordered, that the injunction heretofore granted be continued and the same is hereby made perperual."

The attorney general D. H. Chamberlain on behalf of the State tax officials appealed from said decree to the Supreme Court of the United States.

The appeal was heard in December term 1872, when it was by said Supreme Court

"Ordered, adjudged and decreed by the court that the de-
100 cree of the said circuit court in this cause be and the same is hereby affirmed with costs. * * *"

The State of South Carolina as it appears from the testimony before this court practically accepted said decision as conclusive of the question of the right of the Cheraw and Darlington Railroad Company and its successors to the exemption from all taxations by the State and no attempt was made to assess the property of said company or of its successors for taxation or to tax the same or to collect taxes thereon from the year 1870 down to the year 1897—a period of twenty seven years.

In the year 1897 on March 2, an act of the legislature of South Carolina was passed entitled "An act for the collection of past due railroad taxes and for the distribution of the same," in which it was enacted "Sec. 1. That the attorney general is hereby directed to proceed to institute proceedings to test the right of any railroad company in this State to an exemption from taxation if in his judgment he thinks it proper to do so.

Sec. 2. That the State in any such case may bring one action for all taxes due, State, county "ordinary," and "special," recover the whole in one proceeding * * * ." Stats. of South Carolina vol. 22 p. 453.

Under this act the then attorney general on the 26th, day of March, A. D. 1897 served a summons and complaint upon the officers of the Cheraw and Darlington Railroad Company claiming the sum of one hundred and thirty four thousand dollars to be due to the State by the Cheraw and Darlington Railroad Company, as for twenty years' back taxes and penalties for which the company was alleged to have been "delinquent" in each of said years as if the same had been regularly assessed and charged in each year. Upon appeal in that

together to assess the Cheraw & Darlington Railroad Company for taxation for ten years prior to 1899. The supreme court has decided that an assessment must be made before a suit can be maintained, and we desire to test the liability of the company for taxes and agreed to limit any recovery to ten years back, to wit: 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897 & 1898. The road is on the books for 1899 and 1900 at $6,000.00 a mile. In the former suit, which was discontinued on account of want of assessment the company agreed in writing that it should be valued at $6,250.00 per mile for the 20 years beginning with 1877, which agreement is hereto attached. In order to be absolutely fair we are willing for it to be put at $6,000.00 per mile as you have done the past year and ask that it be so assessed.

All of which is respectfully submitted.

W. F. STEVENSON,
Att'y for Counties Interested.

STATE OF SOUTH CAROLINA,
County of Chesterfield.

The petition of E. T. King as supervisor of Chesterfield county shows:—

I. That he is supervisor of said county.

II. That the Cheraw & Darlington railroad lies partly in Chesterfield county and the balance in Darlington and Florence counties.

III. That prior to 1899 for more than thirty years the said road was left off the tax books and paid no State and county taxes
79 and he desires that the railroad board of assessors may be convened in extra session pursuant to the act of 1900 (page 354) to assess the taxes thereon for ten years prior to 1899.

Wherefore he prays that they may be so convened and he will ever pray etc.

E. T. KING,
County Supervisor.

To Hon. M. R. Cooper, secretary of state. [SEAL.]

80 Plea of the Atlantic Coast Line Railroad Company.

Filed Jan. 19, 1903.

THE STATE OF SOUTH CAROLINA:

STATE BOARD OF RAILROAD ASSESSORS.

Ex Parte: E. T. KING, County Supervisor of Chesterfield County,
against
THE CHERAW AND DARLINGTON RAILROAD COMPANY.

Petition Praying that Board Convene and Assess for Taxes for Ten Years Prior to 1899 Property of the Cheraw & Darlington Railroad Company.

To the honorable the State board of railroad assessors:

The Atlantic Coast Line Railroad Company a corporation under the laws of the State of Virginia and doing business under the laws of the State of South Carolina in response to the notice of the secretary of the State board of railroad assessors gratefully acknowledges the favor extended to it by the decision of your honorable body of May 19th, 1900 directing your secretary to notify the parties interested in the subject matter of the petition of E. T. King, supervisor of the county of Chesterfield who prays that the board convene and assess taxes upon the property of the Cheraw and Darlington Railroad Company for ten years prior to 1899, under the act of 1900—G. S. P. 354, and by the decision of your honorable body that it will hear argument on the question on Tuesday June 12, 1900.

This respondent craves leave to avail itself of the privilege so granted to it to the extent of appearing before your honorable body for the purpose of respectfully presenting this its plea to the jurisdiction of the State board of railroad assessors in the case presented by said petition, and saving and reserving all its rights, notwithstanding such appearance and plea prays that this plea be filed and made part of the records of the State board of railroad
81 assessors.

1. The Atlantic Coast Line Railroad Company became on the 19th day of April 1900 the purchaser of the property of the Atlantic Coast Line Company of South Carolina, in which was included the railroad heretofore known as the Cheraw & Darlington extending *in* Florence in the county of Florence to Cheraw in the county of Chesterfield with the appurtenances of said railroad and all its rights, privileges and franchises.

2. The said Atlantic Coast Line Company of South Carolina had previously become the purchaser of the said railroad and property with its rights, franchises and privileges from the Cheraw and Darlington Railroad Company of South Carolina on the — day of July

A. D. 1898 *bona fide*, for value and with no knowledge of any right in the State or any of the municipal bodies thereof to assess taxes upon the said railroad property so purchased, and on the contrary with full notice of the exemption from taxes to which the said Cheraw and Darlington Railroad Company as owner of said property was and its successors in ownership were entitled by its charter and which it had enjoyed from the year 1863, also with notice that it had been in 1873 adjudged by the highest court to have and possess such exemption and also with the knowledge that the State of South Carolina has acknowledged such exemption before the year 1870 and had acquiesced in said adjudication from the year 1873 down to the year 1897.

3. The State of South Carolina has acknowledged such exemption and acquiesced in said adjudication down to the year — when it was voluntarily surrendered by the Atlantic Coast Line Railroad Company of South Carolina as part consideration of the charter of said last named company.

4. That with the exception of the attempts made by R. I. Humphreys as treasurer of Darlington county and John McCalla county treasurer for Chesterfield county in the year 1870 to assess the property of the Cheraw and Darlington Railroad Company for taxation, in which attempt the State of South Carolina joined, but which
82 attempt was enjoined in a judicial proceeding to which the State became voluntarily a party for the purpose of testing the right of the company to said exemption, no attempt has been at any time or in any year made by the State to assess or tax the said railroad property, nor has the said company been called upon in any year between 1873 and 1897 to make any return for taxes or to pay any taxes to the State or to its counties nor until after the passage of an act of assembly approved the 2nd day of March A. D. 1897, entitled "An act to provide for the collection of past due railroad taxes and for the distribution of the same"—which act was held by the supreme court of the State of South Carolina not to authorize the collection of taxes when there had been no assessment.

5. In the case above referred to of Thomas E. B. Pegues *vs.* R. I. Humphreys, treasurer for Darlington county, and John McCalla, treasurer for Chesterfield county, in which the question of the right of the Cheraw and Darlington Railroad Company to exemption from taxation by the State of South Carolina was squarely made between the company and the State and in which the State voluntarily submitted itself to the jurisdiction of the United States circuit court for the district of South Carolina and in which the right of the company to exemption from all taxation by the State or its counties was decided in the circuit court and on appeal by the Supreme Court of the United States affirming the judgment of the circuit court, an injunction against the officers of the State, in legal effect against the State of South Carolina, from attempting to assess or tax the property of said Cheraw and Darlington Railroad Company was issued, and afterwards was made perpetual and this respondent respectfully

prays that regard may be had by this honorable board to said decision and to said injunction and that this board will respect the said injunction and proceed no further upon the petition of the supervisor of Chesterfield county.

This respondent respectfully submits herewith certified copies of the orders of the said courts issuing said injunction and making the same perpetual, and of the mandate of the Supreme Court of
83 the United States affirming the same.

6. This respondent without waiving its objection to the juisdiction of your honorable board and saving and reserving its right to object thereto and all its rights in the premises respectfully submits, that the act of 1900, p. 354 referred to in the petition of the supervisor of Chesterfield county under which the action of this board is invoked, does not apply in its terms to the property of the Cheraw and Darlington Railroad Company inasmuch as:

(1.) The act in order to be consistent with the constitution must be construed as intended to provide for the future and cannot be made to apply to past transactions.

Its preamble, viz:

"And act to provide for the assessment for taxation of railroad property which has been off the tax books for the years in which they have been off the books and to fix the time when such taxes shall become due and for the collection thereof."

it is submitted, covers the case where hereafter, *i. e.*, after the passage of the act, any railroad property shall come to be dropped or "be off" from the tax books—and cannot constitutionally be construed to cover past transactions or to apply to property which has never been upon the tax books, and which has never come off the tax books, or in the words of the act "been off the books" for certain exceptional years.

(2.) The act must be held to apply only to "taxable property," and inasmuch as your honorable body finds that the amendment of its charter in the year 1863 granted to the Cheraw and Darlington Railroad Company exemption from taxation, that this grant has been adjudicated by the courts to be a contract binding upon the State and beyond the power of the legislature to repeal that this law has been acquiesced in and respected by the State and its successive tax officials and by every attorney general from 1863 to 1897, and that (excepting the attempt of the tax collectors of Darlington and Chesterfield counties in the year 1870 above referred to) the
84 property of said railroad company has never been upon the tax books, we respectfully submit that your honorable board is bound in law to presume and, until the contrary is shown judicially, to act on the legal presumption, that the property of the Cheraw and Darlington Railroad Company never has been and is not "taxable" property and therefore that the act of 1900 cannot and does not apply to it.

(3.) Respondent respectfully submits that only railroad property

upon the property, which was of the Cheraw and Darlington Railroad Company, ceased, it is

Ordered and decreed that the words in the order for injunction, viz: "year 1899" occurring after the words "prior to the" be erased and the words "eighteenth day of July 1898" be inserted in lieu thereof, it is further

Ordered that nothing in said decree contained shall be understood to enjoin the respondents or the taxing officers of the State of South Carolina from collecting by suit or otherwise any sum or sums of money which may be due or charged for taxes on said property of the Cheraw and Darlington Railroad Company after said eighteenth day of July 1898, at which date it was admitted in argument the exemption established in Pegues *vs.* Humphreys was surrendered.

NATHAN GOFF,
U. S. Circuit Judge.

July 31st, 1903.

111

Petition for Appeal.

Filed July 20, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

To the Honorable Nathan Goff, circuit judge of the aforesaid court:

The humble petition of U. X. Gunter, Jr., as successor of former Attorney General G. Duncan Bellinger; W. F. Stevenson, D. S.

Matheson, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, as counsel employed by the State, showeth:

112 I. That by the decree, dated January 10th, 1903, in the above mentioned cause, and the further additional decree modifying same, dated July 31st, 1903, it was ordered that the temporary injunction theretofore granted, restraining them from prosecuting the action of the attorney general in the name of the State against the Atlantic Coast Line Railroad Company and the Cheraw and Darlington Railroad Company for back taxes on the property of said companies be made perpetual.

II. That the said orders dated as aforesaid, are, as your petitioners are advised and submit, erroneous, as set forth in the assignment of error herewith submitted, and the same ought to be reversed.

Your petitioners humbly pray, therefore, that they be allowed an appeal from the said decrees to the Supreme Court of the United States.

W. F. STEVENSON,
STEVENSON & MATHESON,
D. S. MATHESON,
J. M. SPEARS,
S. W. G. SHIPP,
U. X. GUNTER, JR.,
Attorney General of State of So. Ca.,
Petitioners.

113 Order Allowing Appeal.

Filed July 20, 1904.

Appeal allowed as prayed for. Bond in penalty of $2,000.00 conditioned as required by law.

NATHAN GOFF,
U. S. Circuit Judge.

July 16th, 1904.

114 Assignment of Errors.

Filed July 20, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
versus
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

1. His honor, the circuit judge, having found that taxes for a part of the period embraced in the suit, to wit: from January 18th, 1898, to December 31st, 1898, were due and chargeable against the property of the Cheraw and Darlington Railroad Company, now owned by the petitioner, and were not stayed or affected by the originaldecree in Pegues *vs.* Humphreys, erred in granting any order restraining the prosecution of the action in the case of The State of South Carolina *vs.* The Atlantic Coast Line Railway Company, the prin-
115 ciple being that where any portion of the tax sued for is due the court of equity will not restrain an action at law for the recovery of same.

II. That under the admissions and proof before the circuit judge under any view of the case, taxes were due from July 18th, 1898, to December 31st, 1898, and embraced in the said action which was enjoined, and the said judge erred in restraining the State attorneys when it appeared that anything was due, the principle being that a court of equity will not restrain suit if anything is due unless it has been tendered.

III. The circuit judge erred in holding that the case of Pegues *vs.*

Humphreys and others was against all the tax officials of the State, when the record shows that it was only against the treasurers of Darlington and Chesterfield counties.

IV. The circuit judge erred in holding that the judgment of the court restraining the county treasurers from proceeding to collect the taxes was binding on the State of South Carolina, whereas he should have held that a State is never bound by a judgment against its agents or officials and can only be bound by the judgment of a court in a cause where it consents to submit its rights, and such consent can only be given by the legislature, and the court had no power under the Constitution of the United States to bind the State directly or indirectly.

V. The circuit judge erred in holding that all questions as to claim of an exemption, whether raised and litigated or not in the former case were concluded by the judgment therein; whereas he should have held that only such questions as were actually raised and litigated in the former suit are concluded in a subsequent suit for taxes for subsequent years, the same constituting a new cause of action.

116 VI. The said circuit judge erred in not holding that the case presented by the State was on a new and different state of facts from the case of Pegues *vs.* Humphreys, *et al.*, and on new causes of action, and between other parties, and new questions were raised, and that the State was in no wise bound as to such new questions and causes of action and such injunction against her attorneys was improperly granted, and bound the State contrary to, and in violation of, the statutes and Constitution of the United States.

VII. The said circuit judge erred in restraining the attorneys of the State from proceeding when no trespass upon or interference with the property of the petitioner was contemplated, and they were only proceeding in the courts to settle the rights of the parties in a judicial manner without interfering with the property of the petitioner in any way.

VIII. The circuit judge erred in holding that the Supreme Court of the United States alone could open and modify the decree of Pegues *vs.* Humphreys, when it is respectfully submitted that it was is no wise binding on the State and her attorneys and that there is no method open by which the said question can be brought to a hearing in the Supreme Court, except by appeal, and to enjoin the attorneys prevents that from being possible.

IX. The court erred in not holding that the admitted facts, that the decree in Pegues *vs.* Humphrey-, was based on the assumption that there was a consideration for the alleged contract between the State and the Cheraw and Darlington Railroad Company, to wit: the building of the road subsequent to the act of December, 19th, 1863, and that that was untrue and no such consideration existed made an entirely new case, and that under this state of facts the exemption, if any was granted, was only a gratuity and could be re-

voked and had been repealed by the constitution and laws of the State.

117 X. The said circuit judge erred in not holding that the terms used in the act of December, 1863, were not sufficient to confer an exemption from taxation on the Cheraw and Darlington Railroad Company, and that such was not conferred.

XI. The court erred in not holding that there was plain and adequate remedy at law, and there was no particular grounds for the interference of the court of equity.

XII. The court erred in enjoining the attorneys for the State, for the reason that it thereby, in effect, enjoined the State of South Carolina from proceeding in her cause, making this, in effect, a suit against the State, and it was without power to hear and determine the same.

XIII. The court was without power to proceed against these appellants, for the reason that they were acting purely for and as agents of the State, in whose behalf and interest the action sought to be stopped was being prosecuted, and the proceeding was, in effect, against the State and could not be maintained without its consent.

XIV. The court erred in that it, in effect, has enjoined the State from prosecuting its action for taxes in its own name, which said court has no power to do under the eleventh amendment to the Constitution of the United States, and under the Revised Statutes of the United States, section 720.

XV. The court erred in that it held the State bound by a decree in Pegues *vs.* Humphreys, *et al.*, to which the State was not a party, and in which the court would have been without jurisdiction and the decree a nullity if the State had been a party.

XVI. The court violated section 720 of the Revised Statutes of the United States, prohibiting United States courts from enjoining proceedings in State courts, and it thereby erred.

118 XVII. The court erred in holding that the State can be bound by a decree against one of its tax officials when it could not be bound by a decree against itself unless by legislative action it submitted itself to the jurisdiction; and the said court had no power to make such decree binding on the State in this way under the Constitution and laws of the United States.

U. X GUNTER, JR.,
Attorney General of State of So. Ca.,
W. F. STEVENSON,
STEVENSON & MATHESON,
S. W. G. SHIPP,
J. M. SPEARS,
Appellants' Attorneys.

119

Appeal Bond and Approval.

Filed July 20, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer of Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

Know all men by these presents that we U. X. Gunter, Jr., attorney general of the State of South Carolina, W. F. Stevenson, and D. S. Matheson, individually and as co-partners practicing law under the firm name of Stevenson & Matheson; J. M. Spears, S. W. G. Shipp and the American Bonding Company of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, are held and firmly bound unto the Atlantic Coast Line Railroad Company, a corporation organized and existing
120 under the laws of the State of Virginia; I. P. Mangum, county treasurer for Chesterfield county; South Carolina; W. H. Lawrence, county treasurer for Darlington county, South Carolina, and J. O. McLendon, county treasurer for Florence county, South Carolina, in the full and just sum of two thousand ($2,000.) dollars, to be paid to the said Atlantic Coast Line Railroad Company, its certain successors, attorneys, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, and by these presents.

Sealed with our seals, and dated this — day of June, in the year of our Lord one thousand nine hundred and four.

Whereas lately, on the 31st day of July, 1903, in a suit depending in the circuit court of the fourth circuit of the United States for the district of South Carolina, between Thomas E. B. Pegues, a citizen of Mississippi, plaintiff, and R. I. Humphreys, a citizen of South Carolina, county treasurer of Darlington county, South Carolina; John McCalla, a citizen of South Carolina, tax collector for Chesterfield county, South Carolina, and The Cheraw and Darlington Railroad Company, a citizen of South Carolina, defendants, on the petition of the Atlantic Coast Line Railroad Company, a citizen of Virginia, a decree was rendered against G. Duncan Bellinger, attorney general of the State of South Carolina, Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, county treasurer for Chesterfield county, South Carolina; W. H. Lawrence, county treasurer for Darlington county, South Carolina; and J. O. McLendon, county treasurer for Florence county, South Carolina, continuing and injunction theretofore granted against them, the said G. Duncan Bellinger, attorney general of the State of South Carolina, Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, W. H. Lawrence and J. O. McLendon aforesaid, and the said W. F. Ste-
121 venson and D. S. Matheson, Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, and U. X. Gunter, Jr., successor of G. Duncan Bellinger, formerly attorney general of the State of South Carolina, having been allowed an appeal to the Supreme Court of the United States from said decree to reverse the decree in the aforesaid suit, and a citation having been issued to the said Atlantic Coast Line Railroad Company, I. P. Mangum, county treasurer for Chesterfield county, South Carolina; W. H. Lawrence, county treasurer for Darlington county, South Carolina; and J. O. McLendon, county treasurer for Florence county, South Carolina, citing and admonishing *him* to be and appear at the term of the Supreme Court of the United States, to be holden at Washington, on the first Monday of —— next.

Now the condition of the above obligation is such that if the said U. X. Gunter, Jr., attorney general of the State of South Carolina, W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. F. STEVENSON. [L. S.]
STEVENSON & MATHESON. [L. S.]
D. S. MATHESON. [L. S.]
J. MONROE SPEARS. [L. S.]
S. W. G. SHIPP. [L. S.]
U. X. GUNTER, JR., [L. S.]
Attorney General, S. C.

AMERICAN BONDING COMPANY
OF BALTIMORE,
By T. MOULTRIE MORDECAI, [SEAL.]
Attorney in Fact.

Signed, sealed and delivered in the presence of—
Test as to W. F. Stevenson, Stevenson & Matheson, D. S. Matheson :
H. M. DUVALL.

Witness as to J. M. Spears:
E. C. DENNIS.

Witness as to S. W. G. Shipp :
W. M. STEVENSON.

Witness as to U. X. Gunter, Jr. :
W. H. TOWNSEND.

Witness as to A. B. Co. :
K. A. GRACE.

122 STATE OF SOUTH CAROLINA, }
Charleston County. }

Before me the subscribing notary public, personally appeared K. A. Grace and made oath that she saw the corporate seal of American Bonding Company of Baltimore affixed to the within written bond, and that she also saw T. Moultrie Mordecai attorney in fact of said American Bonding Company of Baltimore sign the same, and that she also witnessed the execution and delivery thereof as the act and deed of said American Bonding Company of Baltimore.

K. A. GRACE.

Sworn to before me this 30th day of June, 1904.

WM. AUSTIN,
Notary Public, S. C.

Approved,

NATHAN GOFF,
U. S. Circuit Judge.

July 16, 1904.

case it was held by the State supreme court that the act could not authorize an assessment to be made in the proceedings brought in the court of common pleas to recover the taxes, and that the complaint must aver that defendant's property was assessed for taxation in the years for which the taxes are claimed.

101 As this fact could not be alleged, the suit brought by the attorney general was abandoned and no farther attempt, under that act, was made to claim or collect taxes from the Cheraw and Darlington Railroad Company or from its successor then holding its property.

On the 19th. February 1900 an act was passed entitled "An act to provide for the assessment for taxation of railroad property which has been off the tax books for the years in which they have been off the tax books and to fix the time when such taxes shall become due and for the collection thereof" Statutes of South Carolina vol. 22 p. 354.

It was enacted by section 1 "that when railroad property has not been returned for taxation nor assessed for any years and *were* not put on the tax books for such year or years, and no taxes were paid thereon, and more than a year has elapsed since taxes for such years, if assessed at the proper time, would have been due, the said taxes shall be assessed by the railroad board of assessors, which shall be convened in extra session by the secretary of state for such purpose on the petition of any county supervisor in whose county such railway may be."

Section 2 provides that the said board should "fix the value of said road for each year in which it shall appear that said road has been off the books, separately, and its valuation and the number of miles in each county shall be certified to the respective county auditors as the valuation of property is done when regularly returned and assessed."

Section 3 declares that said auditor "shall enter the said assessment each year separately in the tax books of his office for the respective years and charge the taxes on the assessments under levies for those years as if they had been assessed and levied at the usual time" and he "shall furnish a statement to the county treasurer showing the property taxed the value of the same and the amount due for each year separately."

Section 4 requires "that the treasurer shall immediately
102 demand the said taxes of the company in default or if he find the property in the control of another company demand shall be made of the company which he finds in the possession of the property."

Section 5 provided "that said taxes shall become due as soon as said demand is made, and, if they are not paid within sixty days from the demands made, there may be an action brought in the name of the State by the attorney general and such counsel as the counties interested may employ against the company in default and any company which may be in possession of the property which has

escaped taxation for the recovery of said taxes and suit may be brought for each year separately or for all the years consolidated."

Section 6, declared that "the assessment herein provided shall be limited to the period of ten years immediately preceding the restoration of the property to the tax books and no recovery shall be had for a longer period than ten years."

Under this act the board of railroad assessors on the 29 day of May 1900 were convened in extra session by the secretary of state for the purpose, as alleged, of assessing for taxation the property formerly of the Cheraw and Darlington Railroad Company and now in the control and possession of the Atlantic Coast Line Railroad Company on the ground that said railroad property was off the tax books and had not been returned or assessed for ten years previous to 1899.

Against the protest of the Atlantic Coast Line Railroad Company, successor to the Cheraw and Darlington Railroad Company, in whose ownership and control the said property, which had been of the Cheraw and Darlington Railroad Company, is now held, the said board ignoring the exemption granted to said company by its charter and the decision of the supreme court and the injunction of the circuit court of the United States above set forth, of which the said board has been duly notified, certified its valuation of said property and the number of miles in each county to the county auditors
103 of the counties of Chesterfield, Darlington and Florence respectively—whereupon the county auditor of each county named entered said valuations as "assessments" on the tax books in his office and charged the taxes on said "assessments" and furnished a certified statement to the county treasurer of his county, purporting to show the property taxed, the value of the same and the amount due for each year separately of the said ten years. Thereupon the treasurer of each of said counties demanded said taxes from the Atlantic Coast Line Railroad Company successor of the Cheraw and Darlington Railroad Company as the company in whose control and possession said property was found.

Said sums so demanded were not paid by the Atlantic Coast Line Railroad Company and thereupon on the 27th day of July, A. D. 1901 an action purporting to be under the provisions of said act was brought in the court of common pleas for Chesterfield county in the name of the State by the Honorable G. Duncan Bellinger, attorney general and his associates against said company for the sums alleged to be due for said taxes in said years aggregating the sum of twenty-nine thousand eight hundred and seventy-seven 57/100 dollars.

Thereupon on the first day of October 1901 the said Atlantic Coast Line Railroad Company appeared in the circuit court of the United States for the district of South Carolina and filed in the above entitled cause of "Thomas E. B. Pegues against the Cheraw and Darlington Railroad Company and R. J. Humphreys * * * county treasurer and John McCalla county treasurer" its petition, *in re* against the Honorable G. Duncan Bellinger attorney general in and

for the State of South Carolina, and counsel above named who are associated with him, and the respective treasurers of Darlington, Florence and Chesterfield counties, in which petition the matters of fact above set forth and the interest of the petitioner are alleged, also the matters of law connected therewith, and the petitioner, claiming its said property to be exempt in law from taxation by the said State in the years above named, prayed that it may be allowed the benefit and protection of said decrees of
104 this court and of the Supreme Court of the United States and due process to enforce obedience to the decrees of this court of 1870 and 1872, above referred to, against the above named county treasurers, as the present tax officials of the State, and the said G. Duncan Bellinger attorney general and the said Stevenson and Mattheson, J. M. Spears and S. W. G. Shipp, plaintiff's attorneys, requiring each of them to answer this petition, and also that it may have a writ of injunction issued from this court restraining the said tax officials and also the said attorney general and the said Stevenson and Matheson, J. M. Spears and S. W. G. Shipp plaintiff's attorneys from proceeding under said act of assembly and from prosecuting an action in the name of the State against your petitioner for the recovery of said amounts, claimed as taxes, and against each of the above named county treasurers, enjoining and restraining them and each of them and any and all other persons acting for or in the name of said State from collecting all such amounts, so claimed as taxes and any other amounts, which may be so claimed as taxes prior to the year 1899, in any method provided by law for the collection of taxes legally imposed.

And thereupon on the first day of October 1901 the circuit judge for the fourth circuit for the district of South Carolina issued the following order, viz:

Ordered for Injunction.

"On hearing the verified petition of the Atlantic Coast Line Railroad Company * * * it is ordered that until the further order of this court G. Duncan Bellinger attorney general of the State of South Carolina, W. F. Stevenson and D. S. Matheson, J. M. Spears and S. W. G. Shipp, plaintiff's attorneys, be and they are hereby enjoined from prosecuting, in the name of the State of South Carolina and as her attorney general and her attorneys, an action for the recovery of the sums of money mentioned in the petition and demanded as taxes or any part thereof from the Atlantic Coast Line Railroad Company, and are enjoined from carrying on such action against said company and against the property formerly of the Cheraw
105 and Darlington Railroad Company in the possession of the petitioner.

It is further ordered, that until the further order of this court J. F. Mangum county treasurer for Chesterfield county, South Carolina be and is hereby enjoined from collecting the sum of ten

thousand four hundred and sixty one 90/100 dollars, which — is alleged he has heretofore demanded from the agent of the Atlantic Coast Line Railroad Company at Cheraw, South Carolina, and any fractional part of said sum from the Atlantic Coast Line Railroad Company" * * * (the order contains the like injunction as to W. H. Lawrence county treasurer for Darlington county, South Carolina, and as to the sum alleged to be demanded by him for taxes in his county. A like injunction against J. O. McLendon county treasurer for Florence county, South Carolina, and proceeds as follows, viz:)

"It is further ordered, that the said G. Duncan Bellinger, W. F. Stevenson, D. S. Matheson, J. W. Spears, S. W. G. Shipp and the said J. P. Mangum the said W. H. Lawrence and the said J. O. McLendon do show cause before the circuit judge of this court at Charleston on the 15th day of October, A. D. 1901 at eleven o'clock forenoon why this injunction should not be made perpetual and that any return which may be made to this rule shall be served on the attorneys for the petitioner not less than three days prior to said day."

The order directs that the petition herein be filed and a copy thereof served upon the respondents above named, that petitioner enter into bond, and that *subpœna ad respondendum* do issue requiring respondents to answer the petition etc.

By order of October 15, the date for return was changed from 16th to 25th October 1901 on which last named day the Honorable Charles H. Simonton circuit judge for said district caused to be entered the following order, viz: * * *

"The attention of the circuit judge having been called to the fact that the firm of which he was a member appeared on the record in the case of Humphreys and Pegues, upon which the motion in this case is based, he has come to the conclusion that he ought
106 not to sit any further in the case, the hearing of the rule to show cause returnable this day is therefore postponed. Counsel are at liberty to fix any other day which may suit the convenience of any judge of this court to hear the motion. They will therefore if possible agree upon such a day or take any other steps which they may deem advisable."

Thereupon, counsel agreeing, application was made to me to hear the motion and afterwards on the 18th. and 19th. November 1901 the case was heard before me at Richmond, Va. upon the petition and certified records of the circuit court for the fourth circuit, district of South Carolina, and upon the return, answer, and plea of respondents and upon affidavits, and copies of the reports of attorney generals and proceedings of the General Assembly of said State.

Hearing the petition of the Atlantic Coast Line Railroad Company and the return, answer, and plea of the respondents to the rule to show cause and to the petition herein together with affidavits and other evidence and arguments of counsel for and against the prayer

of said petition, and upon inspection of the records of the circuit court of the fourth circuit for the district of South Carolina in the case entitled "Thomas E. B. Pegues, complainant, against H. J. Humphreys tax collector etc." (1870–1873), the court finds, that the questions, whether the property of the Cheraw and Darlington Railroad Company in South Carolina is entitled in law to exemption from taxation by the State of South Carolina, by virtue of the grant contained in its amended charter, and whether the State would impair the obligation of its said contract by taxing said property, were finally determined by the Supreme Court of the United States on appeal taken in said cause, entitled, "Humphreys tax collector etc. *et al.* against Pegues" reported in 16 Wallace *W.* S. Rep. 244, and that the issues therein determined are *res judicata*, and can
107 not be revived or their decision questioned in any other proceeding. That if there was to be any modification or reversal of the result heretofore reached it could only be made by the said Supreme Court.

Also, that the injunction ordered in said cause on the 17th. day of August A. D. 1870 by the circuit court of the fourth circuit for the district of South Carolina against the tax officials of said State, which was on the 27th. day of April, A. D. 1871 made perpetual, and, as such, was affirmed by the Supreme Court of the United States on the 10th. day of March, A. D. 1873, is binding upon the attorney general of said State and its tax officials of the present day their predecessors and successors in office and for all time, and upon all persons, claiming to exercise or enforce the taxing power of the State of South Carolina against the property of said Cheraw and Darlington Railroad Company; it is therefore,

Ordered adjudged and decreed, that the rule issued in this case be and the same is hereby made absolute and that respondents G. Duncan Bellinger, attorney general for the State of South Carolina; W. F. Stevenson, D. S. Matheson, Stevenson and Matheson; J. M. Spears; S. W. G. Shipp; J. P. Mangum, county treasurer for Chesterfield county, South Carolina; W. H. Lawrence, county treasurer for Darlington county, South Carolina; J. O. McLendon, county treasurer for Florence county, South Carolina, and all other persons whosoever, claiming or to claim to represent the State of South Carolina, or the taxing power thereof, are hereby enjoined and prohibited from proceeding in the action begun, in the name of said State, by G. Duncan Bellinger, as attorney general thereof and his associates the respondents above named, and from prosecuting any other action or proceeding whatsoever or any distraint of property for the collection of money from the petitioner The Atlantic Coast Line Railroad Company or its successors or assigns, upon the claim of taxes alleged to be due to the said State prior to the year 1899 by said company or by the Cheraw and Darlington Railroad
108 Company upon the property which is or was of the Cheraw and Darlington Railroad Company in said State, or, upon the claim of taxation prior to the year 1899 imposed by said State

upon said property in the possession and ownership of the Cheraw and Darlington Railroad Company or in the control or possession of the Atlantic Coast Line Railroad Company.

It is further ordered that the respondents herein shall pay the costs of this petition, and rule, of the return, answer and plea thereto, and of the hearing thereon.

It is further ordered that the petition, return and other papers in this proceeding or used at the hearing of the cause be filed with this decree in said circuit court at Charleston, S. C.,

NATHAN GOFF,
U. S. Circuit Judge.

Jan. 16, 1903.

109 Statement of Counsel as to the Expiration of the Term of Office of G. Duncan Bellinger and His Successor Assuming the Office in His Place.

Filed Aug. 18, 1903.

That subsequently to the filing of said decree the term of office of G. Duncan Bellinger, as attorney general for the State of South Carolina, expired, and U. X. Gunter, Jr., having been duly elected attorney general for said State, qualified and was commissioned and entered upon the discharge of the duties of said office as successor to the said G. Duncan Bellinger, on the 21st day of January, 1903.

Thereafter, on August the 8th, 1903, the Honorable Nathan Goff, United States circuit judge, filed the following order and decree, to wit:

110 Supplementary Decree.

Filed 8 August, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, etc., Complainants,
vs.
R. J. HUMPHREYS ET AL., Defendants.

Ex Parte THE ATLANTIC COAST LINE RAILROAD COMPANY.

Attention of this court having been called to an interpretation put upon the decree of January 16th, 1903 in above cause by respondents' counsel in their assignment of errors for appeal, viz: that the decree enjoins suit by the respondents for the portion of the taxes for the year 1898 accruing after the eighteenth day of July 1898—the date when the claim for the exemption from taxation

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 88.

Office Supreme Court U. S.
FILED
DEC 1 1906
JAMES H. McKENNEY,
Clerk.

U. X. GUNTER, JR., ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, ET AL.,
APPELLANTS,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT OF STEVENSON & MATHESON FOR APPELLANTS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 88.

U. X. GUNTER, JR., ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, ET AL.,
APPELLANTS,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT OF STEVENSON & MATHESON FOR APPELLANTS.

STATEMENT.

The Cheraw & Darlington Railroad Company was chartered by the Legislature of South Carolina on December 19th, 1849, as follows.

I. Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That for the purpose of establishing a communication by Railroad from Cheraw to some point on the Wilmington and Manchester Railroad in the District of Darlington, the formation of a corporate company is hereby authorized, to be called the Cheraw and Darlington Railroad Company, which company, when formed in compliance with the conditions hereinafter prescribed, shall have corporate existence as a body politic in this State.

II. That said company is hereby authorized to con-

struct a railroad from the town of Cheraw to some point on the Wilmington and Manchester Railroad, in the District of Darlington, by a route to be determined by said company afer the same shall have been formed.

III. Provides for opening books.

IV. That when the sum of one hundred and twenty- five thousand dollars shall be subscribed for, in manner herein prescribed the subscribers shall be, and they are hereby, declared to be incorporated into a company, by the name and style of the Cheraw and Darlington Railroad Company and may meet and organize the said company at such time and place as may be designated by a majority of the commissioners herein named for the town of Cheraw.

V. That for the purpose of organizing and forming this company all the powers conferred by the charter of the Wilington and Manchester Railroad Company on the commissioners therein named, shall be vested in the commissioners hereby appointed in the town of Cheraw; and all the powers, rights and privileges granted by the charter of the Wilinington and Manchester Railroad Company to that company, shall be, and are hereby, granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained, except as to the amount of the capital stock, the amount of shares and the sum necessary to authorize organization, and except in so far as the special provisions of this Act may otherwise require the same to be modified or varied.

In the Senate House the nineteenth day of Dec. in the year of our Lord one thousand eight hundred and forty nine, and in the seventy-fourth year of the Sovereignty and Independence of the Uunited States of America.

ANGUS PATTERSON,
President of the Senate.

JOHN IZARD MIDDLETON,
Speaker House of Representatives.

See folio 96, Statutes of S. C. at Large, Vol. XI page 367. And the fifth section, the power clause was amended on December 17th, 1863, by striking out the words "Wilmington & Manchester" and inserting the word "Northeastern"

See folio 96, page 58 and Statutes of S. C, at Large, Vol. XIII, page 219.

So that said section now reads:

I. Be it enacted by the Senate and House of Represen tatives, now met and sitting in General Assembly, and by the authority of the same, That section five of an Act, entitled "An Act to charter the Cheraw and Darlington Railroad Company, ratiffed the nineteenth day of December, in the year of our Lord one thousand eight hundred and forty-nine, be amended so as to read as follows, to-wit: That all the powers, rights, and privilegs granted by the charter of the Northeastern Railroad Company, are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained, except as to the amount of capital stock, and except in so far as the special provisions of this Act may otherwise require the same to be modified or varied."

The road provided for in the charter had completed been and put in operation in 1855, see folio 34, page 21.

Soon thereafter the exemption from taxation enjoyed by the Northeastern Railroad Company was also claimed by the Cheraw & Darlington Railroad Company under the contention that under the term "all the powers, rights and privileges," the Cheraw & Darlington Railroad Company was entitled to exemption from taxation enjoyed by the Northeastern Railroad Company. This is denied by the Appellants, who contend that the conferring of the rights, powers and privileges of one corporation upon another does not confer an immunity from taxation enjoyed by the first corporation upon the second corporation but some broader term must be used. This is contention Number 1.

II. In 1870, Thomas E. B. Pegues instituted a proceeding in the Circuit Court of the United States for South Carolina to restrain the treasurers of Darlington and Chesterfield Counties from collecting taxes assessed against the property of said Railroad Company. He alleged, folio 49, page 30, in the face of truth of history, that subsequent to the Act of 1863 the said road was built, setting up the alleged exemption from taxation and claiming the building

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Citation.

Filed Aug. 1, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except The Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

U. X. GUNTER, JR., as Successor in Office to G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, Appellants,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

To I. P. Mangum, treasurer for Chesterfield county; W. H. Lawrence, treasurer for Darlington county, and C. S. Lucas, as successor to J. O. McLendon, treasurer for Florence county.

You are hereby summoned to be and appear before the judges of the Supreme Court of the United States at the Capitol at Washington, D. C., on the 22nd day of August, next, and *and* then
124 and there to join with U. X. Gunter, Jr., as successor in office to G. Duncan Bellinger, as attorney general of South Carolina; W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, as counsel employed by the State, in prosecuting an appeal from the decree of this court granting a perpetual injunction against you and the said G. Duncan Bellinger, as

attorney general, W. F. Stevenson, D. S. Matheson, J. M. Spears, and S. W. G. Shipp, as counsel employed by said State; and also that you do within thirty days from service file and cause to be filed with the clerk of the circuit court for said district a notice of severance if you do not desire to be joined with the said U. X. Gunter, Jr., as successor to G. Duncan Bellinger, as attorney general of South Carolina, W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, as an appellant in the prosecution of said appeal.

Witness the Honorable Nathan Goff, one of the judges of the circuit court of the United States of America, in and for the district and circuit above named at Clarksburg, West Virginia, the 23d day of July A. D., 1904, and in the one hundred and twenty-ninth year of the sovereignty and Independence of the United States of America.

NATHAN GOFF,
Judge of the Circuit Court of the United States for the
Eastern District of South Carolina, in the Fourth Circuit.

We acknowledge due service hereof.

W. H. LAWRENCE,
Treas. for Darlington County.
C. S. LUCAS,
Treasurer for Florence County, as Successor
in Office of J. O. McLendon.
I. P. MANGUM,
Treas. Chesterfield Co.

Filed in this office Aug. 1 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

125 Notice of Severance on Appeal

Filed August 1, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainants,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

I. P. Mangum, as treasurer of Chesterfield county, W. H. Lawrence, as treasurer of Darlington county, and C. S. Lucas as successor to J. O. McLendon, as treasurer of Florence county, respondents in the above proceeding, upon whom citation has been served to join with U. X. Gunter, Jr., as successor in office to G. Duncan
126 Bellinger, as attorney general, and others, as counsel employed by the State of South Carolina, appellants in prosecuting an appeal from the decree of the circuit court of the United States from the district aforesaid in the above entitled cause, hereby file in said court their notice that they do not desire to appeal from said decree; that they have no authority under the law to do anything which they are therein enjoined from doing if said decree was reversed, and they do not appeal therefrom, and they do hereby sever from their co-defendants on said appeal.

W. H. LAWRENCE,
Treasurer for Darlington County.
C. S. LUCAS,
Treasurer for Florence County, as Successor in Office of J. O. McLendon.
I. P. MANGUM,
Treasurer Chesterfield Co.

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Citation.

Filed Aug. 1, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County; J. O. McLendon, County Treasurer for Florence County, South Carolina, All the said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

U. X. GUNTER, JR., as Successor in Office to G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, Appellants,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

To the Atlantic Coast Line Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the twenty-second day of August, next pursuant, to an appeal filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein U. X. Gunter, Jr., as
128 successor in office to G. Duncan Bellinger, as attorney general of South Carolina, W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, as counsel employed by the State of South Carolina are appellants, and you are appellee to show cause, if any there be, why the decrees in the said appeal mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Nathan Goff, one of the judges of the circuit court of the United States of America, in and for the district and circuit above named at Clarksburg, West Virginia, the 23d day

of July A. D., 1904, and in the one hundred and twenty-ninth year of the sovereignty and Independence of the United States of America.

NATHAN GOFF,
Judge of the Circuit Court of the United States for the Eastern District of South Carolina, in the Fourth Circuit.

Service of above citation is hereby acknowledged this 28th July 1904.

J. T. BARRON,
For Attorneys for Appellee.

Filed in this office Aug. 1 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

129 Order to Transmit Record.

"And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Supreme Court, and the same is transmitted accordingly."

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

130 Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

I, C. J. Murphy, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing 130 pages, is a true and correct copy of all the records and proceedings, in the case of *In re* Thomas E. B. Pegues, complainant, against R. I. Humphreys, *et al.*, defendants, *Ex parte* The Atlantic Coast Line Railroad Company *vs.* G. Duncan Bellinger, attorney general of the State of South Carolina, *et al.*, rendered as aforesaid, together with the decrees and all things relating to the same, as appears by the records now on file in my office.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., in the district aforesaid, this 13th day of August, A. D. 1904.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: File No. 19,457. South Carolina C. C. U. S. Term No. 88. U. X. Gunter, Jr., attorney general of the State of South Carolina, *et al.*, appellants, *vs.* The Atlantic Coast Line Railroad Company. Filed August 25th, 1904. File No. 19,457.

of said road as the consideration thereof and that it was irrepealable. The Apellants deny that any exemption was conferred and allege that if so conferred it was a mere gratuity and was repealed by the Constitution of 1868, it being admitted that the statment that the road was built after said Act of 1863, was untrue (folio 34, page 21), that fact being relied on in the opinion of this Court in Humphrey vs. Pegues, 16 Wall, 244 (See Lawyers Coop Pub Co Edition for full report) Saying,

"The case shows that from 1849 to 1863 no sufficent inducements had been found to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it in addition to the exemption we are considering. But this exemption was conferred; an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, and has since then been and now is in operation. These facts serve to show; first, that there was, in this instance, the consideration that at any time exists for the granting by the Legislature of such privilege, to wit: the acceptance of the same and the building of the road; and second, the intention of the Legislature, by omitting a reference to the original Act of incorporation, to grant all the powers and privilegs that had been at any time conferred upon the Northeastern Company."

The answer of defendants in Pegues vs. Humphreys admits by failing to deny, that the road was built after 1863, and that the conferring of the "powers, rights and privileges" conferred also tax exemption of the Northeastern Company these admissions are now contested and the contention of Appellants is that the case now made by them is on a new state of facts not contested in the Pegues case and hence, if the parties were the same, the questions in litigation are different, and the causes of action being different the former adjudication does not conclude them in the present case, in which they are proceeding to collect the taxes claimed, the causes of action being different from those taxes in litigation in the Pegues case.

This is contention Number II.

III. The Atlantic Coast Line Railroad Company contend

that the State is bound by the decision in Pegues vs. Humphreys by reason of the fact that the Attorney General appeared in said case, and made his report to the Legislature. The Appellants maintain that the Attorney General had no authority to submit the rights of the State to the jurisdiction without Legislative consent and that such consent was not obtained as shown by his report (folio 43, page 26) and no ratification was made by the Legislature.

This contention being that a State can only be bound by a judgment rendered in a case where by legislative authority she submits to the jurisdiction and no suit against an officer and no submission by an executive officer of the sovereign's rights| to a court can result in a judgment binding on the State.

This is Appellants third contention.

In 1900 the Legislature of South Carolina passed an Act to assess railroad property which had been off the tax books more than a year in order to provide a means of assessment for same and directed that demand be made for said taxes when assessed and on failure of payment that the Attorney General of the State and associate counsel institute suit in behalf o', and in the name of the State to recover the same. This course was pursued and the attorneys were proceeding to have the respective rights of the State and the Railroad Company determined in the Courts of the State when the restraining order herein was granted (folio 87, page5 3.) The taxes for the year 1898 were involved and it was admitted at the hearing that all claim of exemption expires July 18th, 1898, and no taxes were paid for that year (fol I10, p. 67) and that the State has the right to proceed to collect taxes for the part of the year from July 18th, 1898, to December 31st, 1898.

IV. That there is plain and adequate remedy at law and no trespass contemplated or attempted and equity could not interfere.

V. That there was admittedly part of the tax due and it had not been tendered and therefore equity will not restrain the suit.

VI. That the Appellants were merely attorneys for

the State without personal interest in the cause and to enjoin the State's attorneys from testing its rights in the Court is in effect to enjoin the State itself and this Court is without power to do so under the constitution and laws of the United States. The Circuit Judge enjoined all officers and attorneys for all time from proceeding to prosecute the State's suit, thereby effectually barring the State from ever testing such rights as it may have in any court.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows:

I. The Court erred in holding in effect that the conferring of the "rights, powers and privileges" of the Northeastern Railroad Company on the Cheraw & Darlington Railroad Company, conferred the exemption from taxation of the one on the other, whereas, it takes some broader term to give the exemption.

II. That the Court erred in not holding that the action in the State Court, enjoined in this proceeding, was on different causes of action from those set forth in Humphreys vs. Pegues, and new and different questions were raised, to wit: The question of the consideration for the alleged contract by building the road after the act 1863, and the question of whether the words "all rights, powers and privileges" carried an exemption from taxation, and these questions were not adjudicated by the decree in Humphreys vs. Pegues.

III. That the Court erred in holding in effect that the State and her attorneys were bound by the judgment in Humphreys vs. Pegues, when she never submitted to the jurisdiction; was no party to the cause and could not be bound by any office unless Legislative consent had been given and the Court in that case had no jurisdiction to bind the State.

IV. That the Court erred in not holding that there was plain and adequate eemedy at law, in as much as no trespass was threatened, and no interference with petitioner's business contemplated, and the only peoceeding contemplated was an action at law in which all defences relied on on by petititner here were available.

V. The Court erred when it was admitted that part of the tax was due and had not been tendered, in not dismissing the petition.

VI. That the Court erred in ejoining the State's attorneys and all parties being associated with them, in that it thereby enjoined the State as effectually as if the injunction had been made against the State in so many words, and this it had no power to do.

ARGUMENT.

The contentions set forth in the above statement, around which all the questions raised in the appeal are grouped are six.

I, That conferring the "powers, rights and privileges" of the Northeastern Railroad Company, upon the Cheraw & Darlington Railroad Company did not confer an exemption from taxation enjoyed by the former on the latter.

On this question this Court has spoken in explicit terms in several cases and these terms will not includean immunity from taxation unless other terms of the Statute remove all doubt as to the intention to con'er the immunity:

In the case of the Phoenix, Fire and Marine Insurance Co. vs. Tennessee, 16 Sup. Ct. Rep. 471, 161. U. S.

"All the rights and privileges" of one Co. was conferred upon another by Statute. The first Company had an immunity from taxation. The second Company contended that it acquired it. The court says it must always be borne in mind in construing language of this nature that the claim for exemption must be made, wholly beyond doubt, for, as stated by Justice Harlan in Railroad Company vs. Gregory, 120 U. S. 569, 7 Sup. Ct. Rep. 693, it is the settled doctrine of this Court, that an immunity from taxation by a State will not be recgonized unless granted in terms too plain to be mistaken. See also Alsobrook vs. Railroad Co., 146 U. S. 279, 13 Sup. Ct. 72, and in such case the existence of a well founded doubt is equivalent to the denial of the claim. "The Court goes on to say further. "That it cannot be doubted that the decisions of this Court are somewhat involved in relation to this question of exemption." It then cites the cases of Keokuk

& W. Railroad Company against Mo. 152, U. S. 301, 14 Sup. Ct. 592, Railroad Co. vs. Miller, 114, U. S. 176 Sup. Ct. 813, Morgan vs. La. 93 U. S. 217, L. C. Bk. 23p. 860, Memphis & L. R. R. R. Co. vs. Railroad Comsrs. 112 U. S. 609, 5 Sup. Ct. 299, and Picard vs. Railroad Company, 130 U. S. 637, 9 Sup Ct. 640, as holding that the grant ofan exemption to one corporation cannot be extended by conferring its "rights, powers and privileges upon another Company, to the second Company."

Then it cites the case of Humphreys against Pegues, 16 Wall, 244, as on the otherside and does not attempt to reconcile it. The fact being that they didn't have the record before them or they would have seen that the exemption was conceded to pass under the word privilege in that case. Hence the Court did not adjudicate it at all.

Then the case of Tennessee vs: Whiteworth is cited on that side but they conclude that the intention to grant the exemption was plainly shown from the general trend of all the statutes. So neither case is irreconcilable with the decision reached by the Court. In Humphrey vs. Pegues the question was conceded, and in Tenn. vs. Whiteworth the statutes themselves showed clearly the intention. They conclude after citting the authorities on both sides as follows.

"The later cases of Picard vs. Railroad Co. supra, and Railroad Co. vs. Alsobrook, supra, shows that there must be other language than the mere word privilege or other provisions in the statute removing all doubt as to the intention of the Legislature, before the exemption will be admitted. If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the presnt time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach. This seems to us to settle the question here. There is no additional word used in statute, and there is nothing in the statute indicating an intention to exempt the property of the defendant. In R. R. Co. vs. Alsobrook 13 Sup. Ct. p. 76 we find the following. "The taxing power is essential to the existence of the goverment, and cannot be held to have been relin-

quished in any instance, unless the deliberate purpose of the State to that effect clearly appears; the surrender of a power so vital cannot be left to inference, or conceded in presence of doubt, and, when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power." See same case 14 S. E. R. 652.

In Tucker vs. Fergson 22 Wall, 527, L. R. Rep. book 22, p. 805 at page 816, the Court says. "The statute exempting thle auds is not a contract. We therefore contend that no such exemption as it claimed was ever conferred and that it would be a great wrong to enforce by a legal fiction a right which was never granted and take from a Soverign State one of her attributes of soverignty with which she has never parted."

The consideration for the alleged contract, to-wit the building of the road in pursuance of the same, being now admiited to be a myth, the exemption if granted, was a gratuity and was repealed by the Constitution of 1868, and as only litigated questions are res judicata in a subsequent suit on the new cause of action, and as the consideration of the contract and its existence was not contested in Pegues case, we are at liberty to make these questions.

There can be no contract without a consideration and in this case there was no consideration. See Cooley Coust. Lim. p. p. 149 and 335, also the case of Grand Lodge vs. State 17 Sup. Ct. Rep. 523.

There the Masons bought property in 1853. In 1855 an act was passed exempting it from tax so long as the Masons occupied it. In 1879 the State adopted a new constitution which contained the following: "The following property shall be exempt "from taxation and no other," and and the particular class of property here exempted was not included. The acition was brought to enjoin the collection of taxes thereon. It was held that it was a mere gratuity which was without consideration and might be revoked at pleasure, and that it had been so done. In the case of Christ Church vs. Philadelphia. 24 How 300, it was held that the gift was "beneplacitum" and could be evoked

by the Legislature. (Read.) So in Tucker vs. Furguson, 22 Wall, 527, L. R. Rep. book 22, p. 805 at page 816, the Court says: The statute exempting the lands is not a con. tractfor the following reasons. There was noconsideration.

The Company was required to do nothing, and did nothin return. As between individuals the stipulation would belong to the category of nude pacts. "It has no higher character becaus one of the parties was a State, the other a corporation, and it put in the form of a statute. It was the promise of a gratuity spontaneously made which might pe kept changed or recalled at pleasure. "So in Wisconsin R. R. Co. vs. Board Supervisors, 93, U. S.. 595. When the same doctrine is held and the court says: "In such cases a reasonable doubt is fatal to the claim." (Exemption) "Prima facie every presumption is against it." The same doctrine is fully stated in Newton vs. Commissioners, 100 T. S. 7e0. So if the Act of 1863 passed an exemption it was a gratuity. The road owned the property then in the fix it is now. The gratuity could be revoked at will, and this had been done. Sec. 2, Art. 12, of Constitution of 1868 provides as follows: "Property of Corporations now existing or hereafter created shall be subject to taxation, except as in cases otherwise provided for in this constitution. Sec. 1. Art. 9, also covers all property exempted as follows: "Munipal, educational, literary, scientific, religious or charitable purposes." No other matters are exempt. This therefore repeals exemptions which are not contracts. It is so held in Tomlinson vs. Jessup, 15 Wall. 454.

2. As to Res. Adjudicata. The case of Humphreys vs Pegues, 16 Wall, 244, decided only one question. The court says: "The bill contains many details which it is not necessary to state. "Upon the arguments of the counsel and the briefs submitted, but a single question is presented for the consideration of this Court." "The stockholders of the Cheraw & Darlington Co. contend that the act last mentioned, (Act of 1885 amending N. E. R. R. charter) formed a part of the Charter of the Northeastern Company in 1863 when the privileges conferred upon that Company were granted to the Cheraw & Darlington Company. The State contends that the priviloges thus granted were

limited to those conferred upon the Northeastern by its original charter, or act of incooporation passed in 1851." There is nothing in the terms of the statue of 1863 to indicate that the Legislature intended to limit the privileges conferred upon the Cheraw Company to those granted to the Northeastern Company, by its original actof incorporation, and to exclude the important privileges contained in the amending act. "The Court then decides as the only question in the case that the act conferred all all privileges held by the Northeastern under the acts of 1851 and 1855. It was a fact conceded that the Cheraw & Darlington Railroad was not built prior to 1863," and it was not questioned that the word privileges would confer an exemption contained in the act of 1855, if that act's privileges were intended by the Legislature, and it was not claimed that the constitution of 1868 repealed the exemption if one existed.

Thus these questions were not litigated on which we rely, (1) The road was not built pursuant to the exemption, (2) Therefore it was no contract and repealable, (3) The word "privileges" in a statute making another statute enforcable does not carry the exemption contained in that statute. These positions we rely on and they were not litigated in Humphrey vs. Pegues. Now these points were not litigated before. Can we be estopped because they might have been litigated? To get at the question we will first settle the question of whether this is the same cause of action in contest in that case. This is a suit for taxes for different years from that.

The United States Supreme Court held in Keokuk & W. R. Co. vs. Missouri, that taxes for different years are different causes of action. 14 Sup. Ct. Rep. 597, this is followed in Phoenix F. & M. S Co. vs. Tennessee, 16 Sup. Rep. 475 and other cases, and cannot be questioned on principle. In the case just cited the Court says "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the Court upon that question might raise an estopped in another suit upon the principle stated in Cromwell vs. Coun-

ty, of Sec. 94, U. S. 351, but as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estopped only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." The question to be settled therefore, must have been actually litigated and settled when the parties are the same, but the causes of action different, i. ei. taxes for different years. That case of Keokuk & W. R. vs. Missouri, grew out of the following facts: The Alexandria & Bloomfield Railroad Company was chartered Feb. 9, 1857, with a tax exemption of 20 years from its completion. It was completed in 1872. It was authorized to consolidate with a road in Iowa under a State statute which provided that such consolidated roads "shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State as if the consolidation had not taken place." Said road whose name had been changed to the Alexandria & Nebraska City R. R. Co., consolidated with the Iowa Southern, an Iowa corporation, under the name of the Missouri, Iowa and Nebraska R. R. Co., and the same had been sold under foreclosure and bought by Keokuk & Western, Aug. 19, 1886. The State of Missouri brought suit against the Missouri, Iowa and Nebraska Co. in 1873 for taxes for 1872, and the exemption granted the Alexandria and Bloomfield charter was claimed and sustained by the Court. In 1881, one Secor, a stockholder, also brought an action and obtained an injunction against the county officers collecting the taxes. This suit was brought by the State of Missouri to collect taxes due on said road for 1886, levied while the property of the Missouri, Iowa and Nebraska Co. and make them a lien on the road in the hands of the Keokuk and Western. The former judgment between Missouri & the M. I. & N. Co. was pleaded as estopped. The Court says in considering that question." It was considered in that case that the Missouri, Iowa and Nebraska Railway Company had succeeded to all the privileges and liabilities of the Alexandria and Bloomfield Co."

"The question upon which the case now under consideration was subsequently decided, namely, that the Mis-

souri, Iowa and Nebraska Railway Company did not succeed to the exemption from taxation provided in the original charter of the Alexandria and Bloomfield Company, was not discussed in that case, since the exemption was conceded to enure to the latter company," nor did the judgment in that case establish a rule of property upon which the plaintiff was entitled to rely, and upan the faith of which it claims to have purchased the road, namely, the right of the Missouri, Iowa and Nebraska Railway to the exemption in the original charter was conceded in that case

See Louisville L. S. L. Railway vs Wilson, 11 Sup. U. S. 402 consent decree is not Resjudicata—c ses cited. Now in Humphreys vs. Pegues, it was conceded that the road was built after the act of 1863 and no claim was made that the constitution of 1868 repealed the exemption if any existed. It was also conceded that if the act of 1855 was part of the Northeastern charter, then the C. & D. got an exemption. These concessions are all denied here, and are the points on which this case must turn if the State is held to have been a party there, and not having been litigated in that, and this being on different causes of action, the estoppel does not apply.

In the case of Alsobrook vs. Wilmington, etc., R. R. Co., the facts were as follows on the point in question: The Halifax & Weldon Road was incorporated as Wilmington & Raleigh Road in 1835 with an exemption. The Halifax and Weldon built its road, the Wilmington & Weldon built to Halifax and under a statute permitting it, the Halifax & Weldon subscribed all its stock, etc., to the W. W. and the shareholders became stockholders in the W. W., and the road became part of the W. W. and claimed its exemption. The statute authorizing saie consolidation says that all the property of the H. & W. shall vest in and be owned by the W. W. & W. "And held and possessed by said Company in the same manner that all other property, real and personal, which has been acquired by the said Company is owned, held and possessed, and the road which may have been built, or partly built by the Halifax and Weldon Railroad Company, shall henceforth be deemed to all intents, civil as well as criminal, a part of the Wilming-

ton & Raleigh Road." In 1869 the State attempted to collect tax on the Halifax & Weldon Road, and the W. & W. got an injunction, Reid vs. R. R. Co., U. S., and restrained the sheriff from collecting tax on the road. This was an action to collect among other things tax on the Halifax & Weldon part, and the former judgment was relied upon. The Court says, 13 Sup. Ct. Rep. 79: "These proceedings (referring to Railroad Co. vs. Reid) are relied on as an estoppel so far as the road from Halifax to Weldon is concerned." "We think they cannot be so regardad. The causes of action are not identical, and the points or questions actually litigated are not the same. The distinction between the road from Halifax to Weldon and the main road from Wilmington to Halifax was not adverted to, and even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been but was not—"brought in the issue and passed upon." See same case 14 S. E. R. 652, (State Ct.)

In the case of Nesbit vs. Independant District of Riverside, 12 Sup. Ct. Rep., 746, the suit was on five bonds of $500 each, being Nos. 14, 12, 16, 17 and 18. The same plaintiff had prior to this brought suit on the interest coupons of bonds Nos, 14 and 15 and succeeded. The defence in each case was that more than the amount of bonds allowed to be issued had been issued, and that plaintiff bought the bonds with notice of the fact.

The defendant in the former suit failed to prove the notice to plaintiff and the Court held that plaintiff was a bonafide holder of the said bonds without notice.

In the second case this was relied on as an estoppel by res. adjudicata. The Court says: "By the rule laid down in Cromwell vs. County of Sac, the judgment in the suit at DesMoines is conclusive in this case only as to the matters actually litigated determined. What were they? The defense pleaded was this: that at the time the bonds were issued the indebtedness exceeded 5 per cent and the bonds were thereupn void. That the district received no consideration, and that the plaintiff was not a bonafide holder. The judgment entry shows that it appeared from the evidence that the indebtedness at the time the bonds were

issued exceeded the constitutional limitation of 5 per cent. but that it was adjudged that the recitals in the bonds estopped the defendant from showing this fact against the plaintiff. In other words, that which was determined was the effect of the recitals.

But this case does not turn upon that question at all, and nothing was determined here antagonistic to the adjudication there.

"An additional fact, that of notice from the amount of bonds purchased, was proved." Suppose two negotiable promisory notes, issued at the same time, as part of the same transaction,. In a suit on the first, brought by a purchaser before maturity, the maker proves facts constituting a defence as against the payee, but fails to bring home notice of these facts to the holder before his purchase. The judgment must go in favor of the holder, for the words of negotiability in the note preclude the maker from such a defense as against him. In a suit on the second of such notes, may not the maker couple proof of notice to the holder with that of the original invalidity of the note, and thus establish a complete defence against the holder? Is he precluded by the first judgment, and his failure in that to prove notice to the holder? That is precisely the case.

In the suit at DesMoines no notice to the holder was shown. "The recitals cut off the defense pleaded of original invalidity." In this action notice is proved, and additional fact is put into the case, which makes a new question. The one question was litigated and determined in the DesMoines suit; the other is presented here, surely an adjudication as to the effect of one fact above does not preclude in the second suit, an inquiry and determination as to the effect of that fact in conjunction with others." Those were actions on contract, and the defenses were no contract for want of certain legal requisites. In the first case it was held to be binding, the party ffghting the contract having failed to prove the facts overthrowing it. In the second case, between the same parties, they were allowed to prove the additional fact, and overthrow the contract. Here in Humphrey vs. Pegues, the action was on contract. The defense was no contract in the ground that the act of

1855 was not part of the charter of the Northeastern when the act of 1863 was passed, held that it was part of the charter and hence there being no other defense put up, there was a contract. In the case at bar the same contract is relied on, and we attack it on the ground that there was no consideration, in that the road was built prior to 1863, and the grant if any, was a gratuity, and was repealed by the constitution of 1868. This is a new fact and a new question in an action on a different cause of action. We attack the elleged contract further, on the ground that the word relied on to convey an exemption will not convey it, this was not a question in the Humphrey suit, and as the Court says in Nesbit vs. Districtsupra: "Here an additional defense is that the five bonds in suit, themselves created an over issue." That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case. It is of itself a valid defense, irrespective of prior indebtedness.

So we have in this case a new question not presented in the Des Moines suit, the existence of facts never called to the attention of the Court in that case, which of themselves create a perfect defense. This was held, although the bonds were actually in evidence in the first case, or at least in Court, in the hands of plaintiff's counsel but the facts and questions were brought to the Court's attentian, and relied on. Now in this case the question of the extent of the word privileges was not raised at all. So that question is still open. The leading case on this point is the case of Cronwell against County of Sac. 49, U. S. 351. L. Coop. Ed. Bk. 24, page 198-200, cited fully and approved in Willoughby vs. R. R. Co., 52 S. C. 172. It lays down the rule as follows: "But when tne second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or vedict was rendered. In all cases therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determ-

ined. Only upon such matters is the judgment conclusive in another action."

To show that the rule in South Carolina is that the question must have been adjudicated in a former suit in order to estop the parties from making it in the subsequent proceeding, we cite first, Henderson vs. Kenner, 1 Rich. Law S. C., page 474.

"Where the plerdings in a case make single questions, to which the verdict directly applies, the verdict is per se conclusive between the parties, as to the matters decided by it. But where the pleadings present two or more distinct propositions, and the verdict may be referred to either, both or all, it is not conclusive, but only prima facie evidence, on any one of the questions, and may be rebutted by evidence aliunde."

This case also decides that parol evidence may be introduced to prove what was actually decided. We cite again the case of Hart vs. Bates, 17 S. C., page 35, which discusses fully these questions and is the leading case in South Carolina on this question:

"The doctrine of 'res judicata' is very far-reaching and effective. It is founded on prsnciples of the wisest policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties or those claiming through them. But whilst it is important to maintain the principle in all its integrity, it is no less important that it should be clearly defined and kept within its proper limits. All agree as to its utility and necessity, but there has been difference of opinion as to its precise limits and its application in particular cases.

As we understand it, the rule established in the Duchess of Kingston's case is, "first, that the judgment of a Court of competent jurisdiction, directly on the point, is as a plea in bar or as evidence conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court

for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." 2 Smith's Lead. Cases 424, and notes. It seems, therefore, that to make out the defence at least three things are necessary; the parties must be the same, or their privies; the subject-matter must be the same, and the precise point must have been ruled."

I cite also the case of Jones vs. Massey, 14 S. C., p 307, where they entertain a second appeal because the difference between rental value and rents and profits had not been called to the attention of the Court on a former appeal in the same case:

If we were not reluctant to shut off inquiry we would hold that the proper principle of the accounting had been adjudged by this Court to be for 'rents and profits,' and not for 'rental value.' This Court, in both of its judgments pronounced by the same judge, so expressed its view in words, and, in the last, particularly declared that the account for the slaves and the land should stand 'on the same grounds.' But the precise difference between 'rents and profits' and 'rental value,' had not been argued before this Court, and as we are inclined to the opinion that the words 'rents and profits' in the judgments, were used in their general sense, we entertain that point now as for the first time before this Court."

We cite also the case of Duren vs. Kee, 41 S. C., page 174, on the same question where the former action was limited by the charge of the judge for finding on one issue, and it was held in the subsequent action that the other issues raised in the pleadings were not concluded thereby, although the finding was made general by the jury:

"It seems to us manifest that the seeming confusion in this case arises from the supposed necessity of considering in every case that the verdict must be considered as a general verdict, responsive alone to the issues of the pleadings; and that therefore, the verdict in this case, "we find for the defendant" is a general verdict in her behalf as to

the whole issues made by the pleadings, without any reference whatever to the charge of the trial judge. It may be admitted that, as a general rule, a verdict endorsed on the record must be considered as responsive to the issues made in that record. But there are well established exceptions to that rule. There are cases where the charge of the judge upon the law involved must be taken into the account, in giving a proper interpretation to the verdict. Here, in the first first case between these parties, the trial judge formally and officially stated, more than once, as follows: "From the evidence in the case, the argument and contention of counsel, and the charge I gave the jury, the inquiry was confined to the question whether the defendant could retain her present pedis possessio, or not." Then from this, we certainly know as a fact that the verdict, "we find for the defendant," was intended to have reference to that inquiry and nothing else. That being the case, is there any principle or rule of law which requires us to ignore what we clearly know to be the truth, and to darkly infer a different interpretation—that the verdict mast have been "a general verdict" upon all the issues originally made in the complaint and answer. This possibly might be so, if the information of Judge Wallace, as stated by him, had been correct, viz: that after the verdict had been pronounced, the trial judge (Hudson) gave his opinion merely, that only one issue, i. e., that as to the pedis possession, had been decided, and, therefore, he made a statement to that effect upon one of the plats which had been used at the trial. But, as we understand the record, the statement was not precisely correct, especially as to the time when the trial judge limited the inquiry to the pedis possessio. He says himself, in the report of the case for the Supreme Court, that it was done during the trial of the case, in his charge to the jury, and, therefore, that limitation must have entered into, and indeed formed the verdict, which, properly construed, should read, "we find for the defendant only as to the pedis possessio." That is the proper construction of the verdict.

We cite further the case of McMakin vs. Fowler, 342 S. C., at page 286, in which it is again held, summing up all of the authorities on the subject, that only the questions

actually decided are concluded and those questions can be determined by introduction of parol evidence;

'We proceed, then to consider the question whether parol evidence was admissible in this case to show what were the issues passed upon in the former action. While it is undoubtedly true that a verdict with judgment entered thereon is conclusive, so far as the parties to the record and their privies are concerned, as to all matters or issues decided by it, yet the question often arises as to what issues were decided, and when this is the case, while we must look primarily to the pleadings to ascertain what were the issues thereby made and decided, yet they are not necessarily conclusive, for, as is said by Evans, J., in Henderson vs. Kenner, 1 Rich., at page 479: "If these (the pleadings) make single questions, to which the verdict directly applies, then the parties are concluded, and the same matter can never, as between them, be inquired into again." But on the same page he adds, "Where the pleadings are general, and there is more than a single proposition to be decided, and the verdict may be equally applied to both or all, in such case a verdict has not that conclusiveness which belongs to it when applied to a single proposition stated in the pleadings." And on the next page that eminent judge states, as the rule resulting faom all the authorities on the subject, "that where the pleadings present two distinct propositions and the verdict may be referred to either, it is inconclusive because there is no precise issue made by the pleadings, and the verdict wants that certainty which is necessary to give it the effect of an estoppel. In such case, as the jury may have decided on both questions, the verdict is prima facie evidence, but it is not conclusive, and may be rebutted by evidence aliunde. Such evidence is not resorted to, to contradict or explain the verdict by any direct evidence of intention; but to give it application by showing what were the facts to which it applied and upon which the jury passed in rendering it. There are many cases in which parol and extrinsic evidence may be resorted to to show the effect of a verdict."

III.

The State cannot be estopped by a judgment against its

officers or by any judgment where it has not voluntarily submitted to the jurisdiction as a result of legislative authority (except of course in an original proceeding in the United States Supreme Court) and to hold that a judgment against two tax collectors represented by the Attorney General bound the State so that her attorneys could not be allowed to contend in Court for her rights would be subjecting every State to the process of every Court which could get personal jurisdiction of her officers as effectually as if she could be sued in her own name. We cite XI Amendment to the United States Constitution as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign States. So that if they say Pegues was indirectly suing the State, we reply that the Court was utterly without jurisdiction and the judgment was no estoppel. See Anderson vs. Cave, 49 S. C., 505. If they say the State was in privity with the defendant and he was the State's agent, we say that they are trying to do indirectly what they couldn't do directly, to-wit: To bind a State by a judgment against its agent when they could not do it by judgment against the State itself. (We deny the privity also) but we have high authority for the position that a judgment against the agent of a State is not an estoppel as to the soverign. In U. S. against Clarke, 8 Peters 444, it was held that the United States could not be sued. The Court saying: "They cannot be subjected to legal proceedings at law or in equity without their consent, and whoever institutes such proceedings must bring his case within the authority of some act of Congress." This was cited and followed in "The Siren," 7 Wall. 152, 1868, and in "The Davis," 10 Wall. 15, 1869, and on this ground the Court held in Carr vs. United States, 8, otto, 433, that a judgment against the agent of the United States was not an estoppel as to the United States. In that case the dispute was to a title to certain lots in SanFrancisco. There have been two actions on on the subject. In 1857 an action was brought against the Marshall of the District of California for ejecting the plaintiff from said lots. He justified under an order of President Pierce requiring him to do so. The jus-

tification was overruled and judgment had against the Marshall. In 1865 the second action was brought in ejectment by the grantee of Carr, Dft. in this action against one Hastings to recover possession of the lot. Hastings, et. al. pleaded that the premises were the freehold of the United States, and that they, as its officers and employees and by its authority, entered & C. "The question of title was gone into and decided against the defendants." The District Attorney for the United States appeared for defendants and defended as did also an attorney specially employed and paid by the Secretary of the Treasury. Then this action was begun by the United States to settle the title to the property. The above judgments were set up as Res Judicata, and it was held that a judgment against the officers and agents was no estoppel as to the soverign. The Court says: "It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the District Attorney and additional counsel to aid in the defense, but we do not think that any such inference can be deduced from the action of the Secretary of the Treasury. "He may have deemed it prudent to assist the officers who were used, without intending to waive any rights of the Government. And in fact he had no authority to waive those rights. In England it is usual for the proper officer to consent in Court that it may take jurisdiction of the matter. This consent is given by authority of the King, who thus submits to be sued in his own Court. The liberal exercise of this authority there removes the difficulty presented here," (Where no power to do this exists in any officer of the Government, and in fact he had no authority to waive those rights) and prevents any opportunity of gross injustice in such cases in England." The appellant contended that the answer setting up tenancy and agency coupled with th5 appearance of the U. S. attorneys made the U. S. virtually a party." That by the law of California judgment in ejectment is an estoppel and that where a tenant, or other person in privity with the landlord is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action. Whilst we concede that this may be the law of California as regards private citizens who are landlords,

we are not satisfied that the same law can be applied to the Government of the United States. We consider it to be a fixed principle that the Government cannot be sued except by its own consent; and certainly no state can pass a law which would have any validity for making the government suable in its own Courts."

"Without discussing the matter further, we are clearly of the opinion that the judgments in the cases relied on by appellant constitute no estoppel against the United States." Now we have here a judgment relied on in which the most that can be contended for is that it was against an agent of the Soverign and defended by the Sovereign's Attorney General, and they ask that the Sovereign be estopped thereby. We say that in this case the U. S. Constitution inhibits expressly the jurisdiction of the Court rendering the judgment, if the State was a party, that no legislative consent was given, that the Attorney General could not consent and, therefore, the State was no party to the case, and cannot be. See Tindal vs. Wesley, 167 U. S., 204. As to the power of Attorney General to waive anything for the State, see Commissioners vs. Rose, 1 Des., 461, where a compromise made by an attorney general of South Carolina made and carried out was disregarded for the reason that he had no authority to waive anything for the State, or make compromises without Legislative authority."

The Attorney General claimed no right to waive the State's rights nor did the Legislature accord him that right or ratify his acts. See his report.

IV.

There is plain and adequate remedy at law, there being the express provision that demand should be made and if the taxes were not paid, suit should be brought at law, which suit was brought and to which suit the Atlantic Coast Line Railroad Company plead. Now if the plea of former adjudication is good, it can be set up as a defence and fully availed of and the Court of equity could not interfere—a case in point is Scottish & U. N. Ins. Co. vs. Bowland 196 U. S., 611.

"As to the question of personal liability of the insurance company to judgment in an action brought to recover the amount of the taxes, we think the Court should not have issued an injunction, as was done, against the prosecution of civil suits for this purpose. If there is no personal liability for these taxes,—a point which we do not feel called upon to decide,—it is perfectly clear that, if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law, and there is no necessity to resort to a court of equity for relief. It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and, if its theory of the controversy is correct, no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction, but leave the party to his defense at law.

U. S. Rev. Stat. par. 723, U. S. Comp. State 1901, p. 583.
Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616-523, 20 L. Ed. 501-503.
Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174.
Deweese v Reinhard, 165 U. S. 386, 41 L. Ed. 757, 17 Sup. Ct. Rep. 340."

This position it seems to us is fatal to the petitioners cause here. In addition to that equity only interferes to prevent trespass on the property or interference with the operations of the party invoking its aid and nothing of that kind was contemplated or possible here.

In Penoyer vs. McCannoghy, 140 U. S., 1, the Court specifying the class of cases in which injunctions are granted against State officials says "Such suit in a proper case, where the remedy at law is inadequate to prevent such wrong and injury is not within the meaning of the 11 amendment an action against the State," the Court defines the cases where it is and is not a case for injunction, and I cite the following from said case:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision, which provides that

"no state shall pass any law impairing the obligations of contracts." This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a state to compell them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself. In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compell it to specifically perform its contracts.

In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164.
State v. Jumel, 107 U. S. 711, 2 Sup. Ct. Rep, 128.
Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91.
Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. Rep. 192, 609.
Hagood v. Southern, 117 U. S. 52, 6 Sup Ct. Rep. 608.

The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the State.

Osborn vs. Bank, 9 Wheat., 738.
Davis vs. Gray, 16 Wall, 203.
Tomlinson vs. Branch, 15 Wall, 460.
Littlefield vs. Webster Co., 101 U. S., 773.

Allen vs. Railroad Co., 114 U. S., 311,
5 Sup. Ct. Rep., 925. 962.
Board vs. McComb, 92 U. S , 531.
Poindexter vs. Greenhow, 114 U. S., 270,
5 Sup. Ct. Rep., 903, 962.

It is not our purpose to attempt a review of all, or even many, of these decisions, as to do so intelligently would unnecessarily protract this opinion, and, in this connection, would subserve no useful purpose. It will be sufficient, perhaps, to refer to some of those which this case most nearly resembles."

In United States vs. Ricket, 23 Sup. Rep., 483 U. S., the Court recognizes the rule that plain and adequate legal remedy will prevent the resort to equity.

When the legal remeds is plain and adequate, no injunction will lie to prevent collection of taxes, We cite the following on this point:

Where there is a plain and adequate remedy at law tax will not be enjoined. We cite,

Indiana Mfg. Co., 50 Koehn, 188 U. S., 681.
Peoples Nat. Bank vs. Mnys, 107 Fed., 570, Va. case.
Douglas vs. Stone, 110 fed., 812, (Va.)
City of Carrington vs. First Nat. Bank, 103 f., 523.

V

It is admitted by the last decree that some of the taxes sued for are due, hence no injuncton can lie in the case, the part that is due not having been tendered. We cite Carrington vs. First Nat. Bank, 103, f. 524.

We refer also to W. U. Tel. Co. vs. Missouri, 23 Sup. Rep. at page 734. This was a case where the defendents desired to defeat the collection of the tax on the ground of excessive levy having tendered the part admitted to be due and the Court says:

"That such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply

alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the cases relied on by it, this cannot be done."

VI.

The sixth contention, if solved in favor of the Appellants, renders unnecessary the consideration of the others. It is, that Appellants are merely attorneys for and agents of the State of South Caaolina without any personal interest in the cause and without any intention of committing any trespass upon the property or rights of the petitioner, merely prosecuting a suit at law to recover a debt alleged to be due the State, in which suit all the defences set up here by the petitioner may and have been set up. That to enjoin all the State's counsel from prosecuting her suit is to enjoin the State from so doing, and the Court is without power to do so. In the case of Chandler vs. Dix, 194 U. S., 590, the Court says:

"It is obvious, without going further, that the bill cannot be maintained. The auditor general and county treasurer claim no interest in the land, and have none in the question whether the State's title is good. The State's title, so far as appears, is the only one assailed. The State therefore, is a necessary party (Burrill vs Auditor General, 46 Mich. 256, 9 N. W. 273; and, as this suit cannot be maintained against a State, the bill so far as it seeks to have tax sales declared void, must be dismissed, whether it be admitted that Michigan is not represented, or be said that it is represented by the auditor general. The plaintiff relies upon the Public Acts of Michigan, 1899, act 97, adding par. 144 to the general tax law of 1893. That act provides that "the auditor general shall be made a party-defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as State tax lands, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made." But we are of opinion that if the foregoing words otherwise would apply to this case, they should not be con-

strued as expressing a waiver by the State of its constitutional immunity from suit in a United States Court."

Now the State is entitled to the taxes in dispute. It cannot be decided as to her if she is not before the Court, and if she is before the court in the person of her attorneys this court is without power to render judgment against her.

In International Postal Supply Co. vs Breece, 194 U. S. court says:

"It was pointed out that the defendant had no persona interest in the continuance of the use, and that, so far as the injunction was concerned, the suit really was against the United States. Of course if those defendants were enjoined, other persons attempting to use the caisson gate would be, and thus the injunction practically would work a prohibition against its use by the United States."

So here if Appellants are enjoined, their successors and such other counsel as the State employes, will be enjoined and a prohibition against the State's prosecution of its suit will result.

The injunction was not only a violation of the XI Amendment to the Constitution but of Section 720 Statutes of U. S.

This has been held to extend to enjoing officers of the State Court. See Diggs vs. Walcott, 4 Branch 179.

In Peck vs. Jenness, 7 Howard 624, the Court says: "The fact therefore, that an injunction issues only to the parties before the Court and not to the Court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The acts of Congress of the 2nd. of March; 1793, Ch. 66, Snc. 5, declares that a writ of injunction shall not be granted to stay proceedings of any Court of a State." Approved in Watson vs. Jones, 16 Wall, 673.

In Haines vs. Carpenter, 91 U. S., 254, the Court says: "In the first place, the great object of the suit is to enjoin and stop litigation in the State Courts, and to bring all the litigated questions before the circuit court. This is one of

the things which the Federal Courts are expressly prohibited from doing."

In Deal vs. Reynolds, 26 U. S., 340, the Court says: "The grava-men of what is desired as to Reynolds is an injunction to prevent his proceeding at law in the State Court- Without this all else is of no account. Any other romedy would be unavailing. Such an injunctin no Court of the United States can grant." To the same effect are Texas Pacific Rwy. vs Kuteman, 13 U. S., C. C. A. Reinoch vs. R. R. Co., 53 Fed., Rep. 33; Chicago Bank vs. Benty, 59 Fed., Rep. 645; Fall vs. Saybrook, 66 Fed. Rep 339. Now if they were attempting to enjoin the State directly they could not do so for two reasons.

1st. The Court could not entertain a suit against the States and 2nd., it is plainly within the prohibition of Rev. Stat. S. 720.

Can they enjoin indirectly by enjoining the Attorneys of the State? We submit that they cannot, because—1tt. The attorneys are the officers of Court by means of whom the case must proceed if at all and if they should be enjoined and all the attorneys were enjoined from proceeding with the case, the case in the State Court would be as effectually enjoined as if the plaintiff were itself enjoined from proceeding and indeed the injunction could act effectively to stop the State only on the Attorneys sought to be enjoined. So it would be a plain violation of Section 720, Rev. Stat.

It would in the next place, be an action or proceeding against a State which cannot be maintained. This is held in many cases. In Belknop vs. Schild, 161 U. S. 10, it is held as follows:

"But no injunction can be issued against officers of a State to restrain or control the use of property already in possession of the State, or money in its treasury when the suit is commenced as to compel the State to perform its obligations or where the State has otherwise such an interest in the object of the suit as to be a necessary party." This is a proceeding to compel the State to perform its obligations if it is anything, and is against officers of the State. In Cunningham vs. Railroad Co. 108 U. S., 446,

the Court says: "It may be accepted as a point of departure unquestioned that neither a State nor the United States can be sued as defendant in any Court in this coun try without their consent except in the limited class of cases which a State may be made a party, in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution. The principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the Court according to the rules which govern its procedure to grant the relief sought, it will refuse to take jurisdiction. In the case now under consideration the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked." Again in Belknop against Schild, Supra. The Court after stating that where a tax collector is proceeding under a void statute to distrain personal property for taxes he can be sued for trespass or if the legal remedy was not adequate he can be enjoined, the taxpayer having tendered coupons in payment which were refused.

But where the Circuit Court of the U. S. at the suit of one who had tendered such coupons in payment of taxes issued an injunction against the attorney general and the attorneys of the State of Virginia to restrain them from bringing an action in behalf of the State to recover such taxes, and upon their bringing such actions, committed them for contempt in disobeying the injunction, they were discharged by this Court on writs of Habers Corpus. Mr. Justice Mathews again delivering its opinion and fully reviewing the previous cases said that the decision in Cunningham vs. Railroad Co. above cited, applied, "The rule is that when it is manifest upon the face of the record that the defendants have no individual interest in the controversy and that the relief sought against them is in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree the question then arising, whether the suit is against the State, is one of jurisdiction, and added that actions had been sustained against officers acting in behalf of the State, only in those instances where the act complained of, considered

apart from the official authority alleged as to it justification, and as the personal act of the individual defendant constituted a violation of rights for which the plaintiff was entitled to a remedy at law or in equity against the wrong doer in his individual character and that the eleventh amendment of the Constitution decreeing that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state must be held to cover not only suits brought against a State by name, but those also against its officers agents and representatives where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates" and therefore, concluded that the suit in which the injunction was granted was in substance and in law a suit against the State of Virginia and consequently the Court was without jurisdiction to entertain it, the order of injunction and the commitments for contempt were null and void and the imprisonment of the officers was without authority in law. In re, Ayers 123 U. S. 443.

The case of Ayers cited is an exact parallel of ours and covered by it.

The case of Fitts vs. McGee, 12 Sup. Ct. 274 ,172, U. S. 516, also puts the case clearly thus: "To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted not literally and two narrowly, but fairly, and with such breadth and largeness as to accomplish the substance of its purpose, in this spirit it must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives where the State though not named as such is nevertheless the only real party against which alone in fact the relief is asked and against which the judgment or decree effectually operates." * * "There is a wide difference between a suit against individuals holding official positions under a State to prevent them under a sanction of an unconstitutional statute from committing by some positive act a

wrong or trespass, and a suit against officers of a State hereby to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State." * * Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land for whatever form of proceeding against him he can make his defense upon the ground that the statute is unconstitctional and void. And that question could be ultimately baought to this Court for final determination."

We think this covers the case fully.

The Appellants represent no personal interest but any action will affect the State alone. They contemplate no personal trespass or act for which an action of damage would lie around them personally. The petitioner has the right to all the benefit it is entitled to from the decree in Pegues vs. Humphreys in the judicial proceedings already instituted by them and can carry it to Court of last resort of the United States. It is a mere judicial meeting to test the liability for taxes and the State cannot be enjoined from so proceeding by enjoining the attorneys:

In Ex Parte Ayer cited adove the situation was exactly the same.

And the case was held to be one against the State, void for want of jurisdiction and the commitment for contempt was set aside.

I will now notice one of the contentions of the petitioners:

1st. They claimed in the Circuit Court that while the Court ordinarily will not enjoin when there is adequate remedy at law, still in an ancilliary proceeding it will be done. We contend that an ancilliary proceeding can only be based on a valid adjudication and if the original judgment is not effective against the State and its attorneys the ancilliary proceedings will not be effective either.

STEVENSON & MATHESON,
For Plaintiffs in Error.

W. J. Stevenson

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IN THE

Supreme Court of the United States.

No. 88.

U. X. GUNTER, JR., ATTORNEY-GENERAL OF THE STATE OF SOUTH CAROLINA, ET AL., APPELLANTS,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEES.

Appellants' Additional Brief in Reply to Argument of Appellees.

The appellees assume the position that the appearance of an attorney-general in a suit in which one of the tax officers of South Carolina was a defendant, causes the State to be subjected to the jurisdiction of the court and the judgment binds the State, relying upon the case of the State of South Carolina *vs.* Corbin & Stone, 16 S. C. 533. That was a case in which the suit was brought by the State for the recovery of money in the hands of the defendants, and was expressly authorized by statute. To cite the case in full, I cite the following:

"Before considering these questions, however, it will be proper to dispose of the question which lies at the threshold of the case, as to the authority of the attorney-general to institute this action. In 1873 Attorney-

General Melton, under 'An act to fix the salary and define the duties of the attorney-general' (Gen. Stat. 109, sec. 26), which empowers the attorney-general, when in his judgment the interests of the State require it, to file and prosecute proceedings against persons who intrude upon the lands, rights, or property of the State, . . . commenced proceedings against the South Carolina Phosphate Company, Limited, or the 'Oak Point Mines,' for intruding upon the rights of the State by mining and removing from North Wimbee Creek, a navigable stream, phosphate rock, the property of the State, and prayed judgment for the value of the rock removed, and for perpetual injunction. . . . The appellants, with Attorney-General Melton, represented the State. Under an order of court in that proceeding, this company paid to appellants the sum of $28,000. Of this amount they paid to the treasurer in June, 1877, $206.06, retaining the balance as fees for professional services, viz: $17,737.34 in that case, and $10,056.60 in another. Attorney-General Conner, at the instance of Comptroller-General Hagood, in August, 1877, brought action to recover this money, thus retained by appellants as counsel fees, claiming that appellants, under the order of the court hereafter to be considered, were entitled to retain only the sum of $3,700. This action thus commenced by Attorney-General Conner has been continued by Attorney-General Youmans, and is the one now before the court.

There can be no doubt but that Attorney-General Melton, under section 5 of the act above referred to (Gen. Stat. 110), had authority, on his own motion, to commence the action against the phosphate company, which resulted in the recovery of the money here sued for. This section is as follows: "He may, when, in his judgment, the interests of the State require it, file and prosecute information or other process against persons who intrude upon the lands, rights, or property of the

State." This gave Attorney-General Melton full authority to act in the original suit, and we think the act is wide enough to vindicate the action of Attorney-General Conner in instituting this suit and Attorney-General Youmans in prosecuting it. This suit may well be regarded as an incident to the action against the phosphate company. It is intended to gather the fruits of that action, and was rendered necessary as a result thereof.

Besides, if the appellants illegally withhold the State's money claimed at their hands, why is not this a violation of the act above cited? Money is property, and if appellants are illegally in possession of the State's money and refuse to deliver it, why, in contemplation of law, may they not be regarded as having intruded themselves upon the property of the State and thereby made themselves liable under the act above referred to?

But, in addition to this, the attorney-general is especially required to "defend the rights of the State in all cases where its rights are involved." (Gen. Stat. 110, sec. 35.) The prosecution of a claim in behalf of the State is defending its rights. In fact, inasmuch as the State is seldom or never a defendant in a cause, the only, or, at least, the general way in which he may be called upon to defend its rights, is by prosecuting its claims as plaintiff."

In act of 1868, under which the authority to prosecute this action was given, sections 2 and 3 of the act, found on page 88 of 14 Statutes at Large, are as follows:

> "Sec. 2. He shall appear for the State in the Supreme Court in the trial and argument in said court of all causes, criminal and civil, in which the State is a party or interested, and in such causes, in any court or tribunal, when required by the governor or either branch of the general assembly.
>
> "Sec. 3 He may, when, in his judgment, the interest of the State requires it, file and prosecute

information or other process against persons who intrude upon the lands, rights, or property of the State, or commit or erect any nuisance thereon."

But in this case, although they held that under the clear authority given, the attorney-general had the right to prosecute the action in the name of the State, still, although he had brought the State into court, he can not allow a suit for a counter-claim to be maintained in that very action against the State. The court is emphatic in its decision on this question. We cite as follows:

"Next, did the judge err in holding that the State could not be sued in her own courts, and on that ground in ruling out the counter-claims of appellants? It is hardly necessary to discuss the question as to the right of an individual to sue the State directly. That no such right exists is universally admitted. However righteous, just, and meritorious the claim may be, the courts can afford no remedy. The State, in her sovereignty, will do justice at her own will, and not by the intervention of her courts. The courts are of her own creation and for her citizens. Treasurers *vs.* Cleary, 3 Rich. 374; State *vs.* Baldwin, 14 S. C. 138."

"But, whatever may have been decided elsewhere, in the face of our own cases of the Treasurers *vs.* Cleary and the State *vs.* Baldwin, we can not do otherwise than hold that the claim of appellants had no legal status in the court below. It is universally admitted that a State cannot be sued in its courts without its consent. Our courts have decided that a counter-claim is a suit. It is so recognized in this case by the appellants in their motion for judgment on the failure of the State to answer their counter-claim, and can not be set up.

"There can be no doubt, however, that there is an underlying principle of justice, which might permit

defendants, under proper regulations, to have their claims against the State, if any, considered and passed upon by the same tribunal before which they may be summoned to answer the State. And, if we might presume to suggest, it may be wise for the general assembly to enact some remedy in such cases. Until then we must declare the law as it stands. Our province is judicial, not legislative."

The State of South Carolina *vs.* Corbin & Stone, 16 S. C. This shows that, though he could start an action for the State, he could not, by *appearing for the State, give jurisdiction to a claim against the State.*"

So, the case of the State of South Carolina *vs.* Corbin & Stone does not only not sustain counsel's position that the appearance of the attorney-general in any suit will bind the State, but it shows that the rule is to the contrary, and the position that the fact that he had reported this action which he had brought to the legislature, and it had not directed him to discontinue the action, is a presumption raised in favor of the State's interest; but the silence of a State does not allow a presumption to be raised against its interest because no action has been taken. The dereliction of an officer or of a legislature in taking no action can not be construed into an estoppel against the State when it attempts to correct any misdeeds and assert its rights.

Now, as to citation of counsel from 14 Statutes at Large, page 367, we desire to give the entire three sections. These are sections enacted for the purpose of devising a method for the recovery of taxes when erroneously paid, and are as follows:

> "Sec. 6. Whenever any person, or persons, charged with taxes upon the books of any tax collector in this State, shall state, in writing, to said collector that he, or they, have been erroneously or illegally charged with the same, said collector shall submit to the county auditor a full statement of the facts in the case, which

statement shall be forwarded to the State auditor, with such additional information, relating thereto, as the said county auditor may be able to give; and said tax collector shall not be required to proceed against the party or parties so claiming to have been erroneously or illegally charged with taxes, by distress or otherwise, until the State auditor shall, in writing, direct him so to do.

"Sec. 7. In any action or proceeding against any tax collector in this State, for the purpose of recovering any property or money alleged to have been erroneously or illegally assessed and collected, the party bringing such action or proceeding shall make it appear that notice in writing of the claim on which such suit may be brought was given to said tax collector in pursuance of the sixth (6th) section of this act; and unless it shall be made to appear that said collector has proceeded contrary to the provisions of this act, the amount recovered in such suit shall not exceed the value of the property or money aforesaid.

"Sec. 8. It shall be the duty of the attorney-general of the State to defend any suit or proceeding against any tax collector, or other officer, who shall be sued *for moneys collected*, or *property levied on*, or *sold on account of* any tax, *when the State auditor shall have ordered such collector to proceed* in the collection of any such tax, after notice as aforesaid, or suit brought; and any judgment against such collector or other officer, finally recovered, shall be paid in the manner provided in section 81 of the act to provide for the assessment and taxation of property aforesaid."

It will be noticed that the attorney-general is given the right and it is prescribed as his duty to defend his suit against a tax collector sued for *moneys collected* or *property levied upon*, and the conferring of that power upon him in that instance makes it clearer that in other instances of litigation against tax collectors he has not

the power to appear, and the case of Pegues *vs.* Humphreys was not one of the cases specified in this statute. Neither would the judgment, even if it were specified, be binding upon the State, as we understand the law. In the case of *Ex parte Dunn, in re Hand vs. Savannah & Charleston R. R. Company, 8 South Carolina, at page* 207, we find that there was a statute expressly authorizing the attorney-general to appear and bring suit and bind the State in certain railroad litigation. In this case, pursuant to the express authority given to appear, he appeared and certain judicial proceedings were had and judgment rendered, and when the petition of Dunn was filed the position was taken that the judgment which had been obtained, with the attorney-general participating, bound the State of South Carolina. The Supreme Court in an able opinion said:

> "The Attorney-General, although a law officer of the State, in fact properly belongs to its executive department, and has *no more power to control the State by his action in court than the Governor or the Comptroller-General.* Indeed, when a State can be made a party in the Supreme Court of the United States, the process to that end must be served on the Governor."

It seems to us that this is conclusive of the position that the appearance of the Attorney-General in Pegues *vs.* Humphreys bound the State. I cite further in the opinion of Hand *vs.* Savannah & Charleston Railroad Co., supra, the following: "The power conferred on the attorney-general to bind the State by appearing in any action against any railroad company must be held to refer only to cases of a nature similar to those he was authorized to bring under the act and must be confined to the purpose which it was intended to accomplish. The end proposed by the act was an enforcement of the lien given

to the State to secure its guaranty. It contemplated no purpose of a different character. *Will it be claimed that the attorney-general, by so appearing, could bind the State to any order which should be made in the cause, even to the discharge and release of the lien of the State, while at the same time it should be ordered to pay the bonds which it had guaranteed? The right of appeal would be no safeguard, for the appeal could only be taken and perfected by the attorney-general himself, who it is not natural or likely to suppose would move against an order to which he had consented, even if such a course would be consistent with the practice of the courts.*

"How, then, can it be contended that a right secured to the State, in full consideration, on its part, to take possession of certain property by a designated officer, can be lost by the consent of another of its officers, the attorney-general?"

This last citation discusses the law relative to a case where explicit authority is given for the attorney-general to appear and bind the State, and still it was held that it must be in a case exactly in conformity with the cases enumerated in the statute before his appearance and consent would be binding.

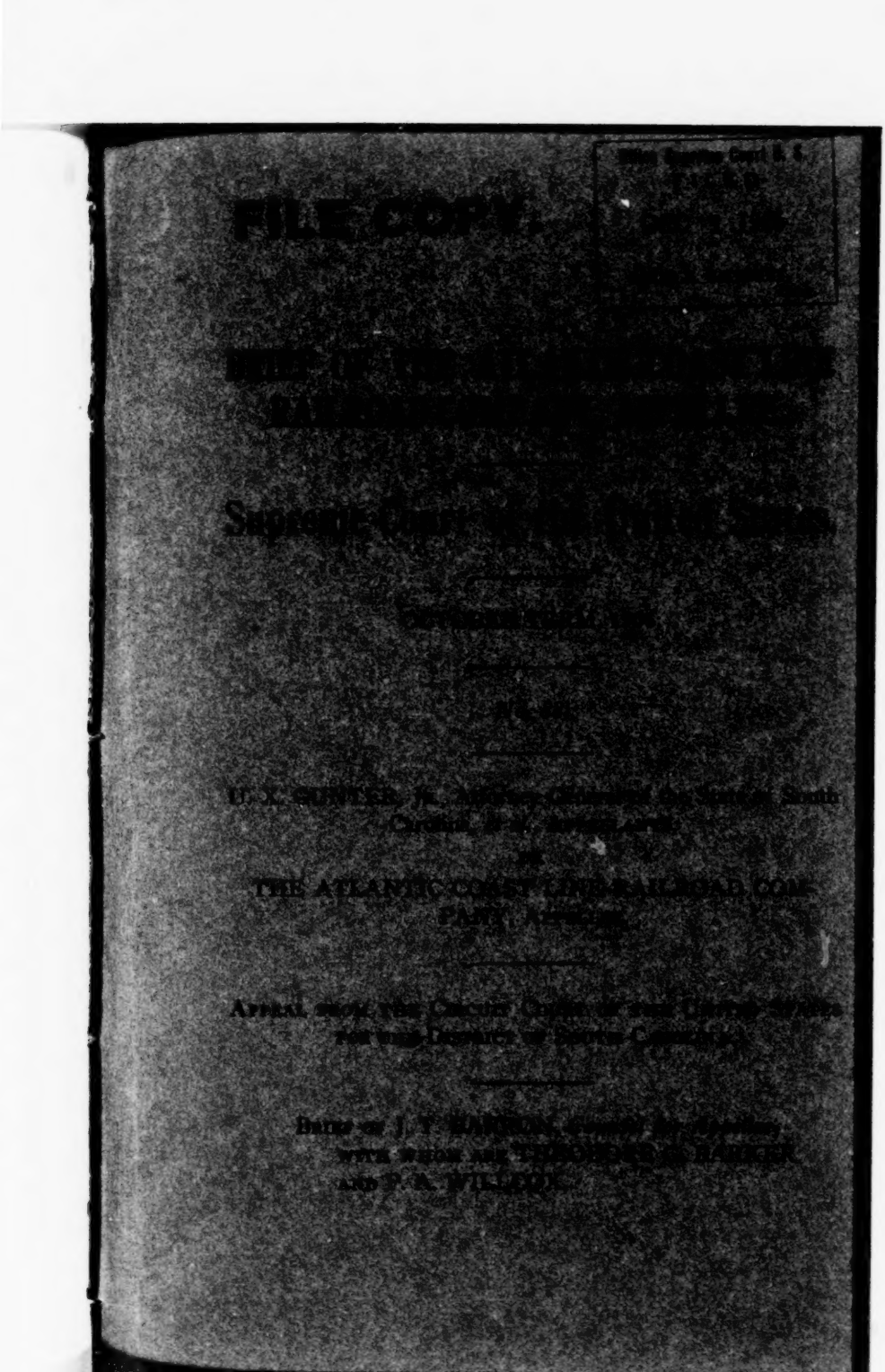
If the State had itself been made a party defendant, the Attorney-General would have to appear for it, under the law, and answer. Can it be contended that the fact that he appeared gave the court jurisdiction and the judgment would bind the State? If it is contended that his appearance bound the State *when it was not a party, wouldn't it do it equally when it is a party?*

Now, as to the point made in appellees' discussion of the 12th assignment of error, that our position that this is a proceeding to restrain State officers from prosecuting a suit on behalf of the State would be well taken if it were an original action, but that it is not well taken,

inasmuch as this is an attempt to make the party named amenable to a decree already rendered in an action in which they were not parties, I will say that that position is demolished by the reasoning and decision in the case of In re Ayres, 123 U. S. 443, which is fully cited in pages 31 and 32 of my original brief. There the plaintiffs obtained a decree in a suit in which the attorney-general was one of the defendants, enjoining him from bringing suit for taxes under a similar statute to this, and also enjoining the tax collector from proceeding to levy on property for taxes. The attorney-general, in defense of the decree, institutes his action according to the statutes directing him to do so, whose constitutionality was challenged just as the statute under which we are proceeding is challenged. In furtherance of the enforcement of the decree rendered by Judge Bond, he was ruled and attached for contempt, and the Supreme Court of the United States discharged him on the ground that it was a proceeding practically against the State, for the reason that it restrained all its officers, in fact restrained the State itself from prosecuting its case. There is no difference between that case and this, except that the attorney-general was there a party to the suit in which the original decree was rendered, while here he was not a party, which makes our case stronger even than the case of Ayres.

In our case the attorney-general was not a party. No injunction was issued against his prosecuting the action. The only injunction was against the issuance of process by the tax collectors. In Ayres case he was a party, and tax collectors were enjoined from issuing process and Ayres as attorney-general from bringing suit. Still the court held he was at perfect liberty to go ahead. They could not bind the State by enjoining the legal department. Here the same reasoning applies with greater force.

W. F. STEVENSON,
For Appellants.



Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 88.

U. X. GUNTER, JR., Attorney General of the State of South Carolina, *et al.*, APPELLANTS,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF J. T. BARRON, *Counsel for Appellee,* WITH WHOM ARE THEODORE G. BARKER AND P. A. WILLCOX.

STATEMENT OF THE CASE.

This is an application to the Circuit Court of the United States for the District of South Carolina, in Equity, on the part of The Atlantic Coast Line Railroad Company of Virginia, operating, in consolidation with others, under the name of "The Atlantic Coast Line Railroad Company"—successor in ownership and interest to the Cheraw and Darlington Railroad Company of South Carolina.

It asks the Circuit Court to execute the Decrees of said Circuit Court of August 17, A. D. 1870, and of 27 April, A. D. 1871, in the suit of *Pegues* vs. *Humphreys et al.*, which were rendered against the tax officials of the Counties of Chesterfield and Darlington, which Counties then embraced the territory, now forming the Counties of Chesterfield, Darlington and Florence, in the State of South Carolina.

The Decree of the Circuit Court of April, 1871 (Transcript, fols. 62 and 70), had perpetually enjoined the tax officials of the Counties of Chesterfield and Darlington from enforcing process for the collection of any tax or assessment against the Cheraw and Darlington Railroad Company in the respective Counties, and, on appeal, was affirmed by the Supreme Court of the United States, in the case of *"Humphreys* vs. *Pegues," March 10, 1873*, and ordered to be executed (see *Mandate*), (Transcript, fols. 71 to 77).

The decision of the Supreme Court in 1873 had declared, that, by its charter, the property of the Cheraw and Darlington Railroad Company in South Carolina is perpetually exempt from taxation by the State of South Carolina (*Humphreys* vs. *Pegues, 16 Wallace, 244*).

From the year 1873, to the present time, no occasion or necessity for the enforcement of said Decrees, by active process, has arisen, the State of South Carolina, and her tax officials having, for more than thirty years, respected the judgment of this Court, and refrained from placing the said property on the tax books for taxation. (Transcript, folios 46 and 78.)

In the year 1898, The Cheraw and Darlington Railroad Company of South Carolina, under the provisions of the Act of Assembly, December, 1897 (22 Statutes of So. Ca., 653), was consolidated into the Atlantic Coast Line Railroad Company of South Carolina, which latter became the purchaser and legal owner of the Cheraw and Darlington Railroad in South Carolina, extending from Florence, in the County of Florence (formerly a part of Darlington County), to Cheraw, in the County of Chesterfield, in said State; and had become the

owner of all the other property and assets, which were of the Cheraw and Darlington Railroad Company, remaining in its possession on 18th July, 1898, of the stock of that Company, and of all the rights, privileges and franchises to which said Cheraw and Darlington Railroad Company had been and was then entitled.

By a compact made in 1897 with the State of South Carolina, in consideration of the grant of its charter, the Atlantic Coast Line Railroad Company of South Carolina surrendered to the State, in 1898, the exemption from taxation of its property theretofore held and enjoyed by the Cheraw and Darlington Railroad Company; the State accepted the surrender, and the taxes on said property have been regularly assessed and paid since the date of said surrender.

In the year 1900, the Atlantic Coast Line Railroad Company of Virginia purchased from the Atlantic Coast Line Railroad Company of South Carolina the stock and property which had formerly been of the Cheraw and Darlington Railroad Company, with its franchises, rights and privileges, went into possession thereof, under the name of the "Atlantic Coast Line Railroad Company," and is the legal successor of that corporation in ownership, possession, and interest. It has been so regarded and dealt with by the tax officers of the State, and is so treated in the appellants' suit, which has been enjoined by these proceedings. (Transcript, fol. 30, fol. 47, fol. 87, fol. 88.) It is the Petitioner in this cause. (Transcript, folios 10 to 17.)

On the 19th February, 1900, an Act of the General Assembly of the State of South Carolina was approved, entitled *"An Act to provide for the assessment for taxation of railroad property, which has been off the tax books, for the years in which they have been off the books, and to fix the time when such taxes shall become due and for the collection thereof."*

Under the provisions of that Act, which is quoted at length in the Petition (Transcript, folios 12-13), it is required:

Sec. 1. *"That when railroad property has not been returned nor assessed for any year and no taxes were paid thereon and more than a year has elapsed since such taxes, for such years, if assessed at the proper time, would have been due, the said taxes shall be assessed by the Railroad Board of Assessors, which shall be convened in extra session by the Secretary of State for said purposes, upon the petition of any County Supervisor in whose County any part of said railway may lie."*

Section 2 requires such board to *"fix the value of said road for each year that said road has been off the books separately,"*

and *"its valuation with the number of miles in each County shall be certified to the respective County Auditors, as the valuation of railroad property is done when regularly returned and assessed."*

Section 3 requires "that the said Auditor shall enter the said assessment each year separately, on the tax books in his office for the respective years and charge the taxes on said assessments, under the levies for those years, as if they had been assessed and levied at the usual time; and he shall furnish a certified statement to the County Treasurer, showing the property taxed, the value of the same, and the amount due for each year separately."

Section 4. *"That the Treasurer shall immediately demand the said taxes of the Company in default, or, if he find the property in possession of another Company, demand shall be made of the Company which he finds in possession of the property."*

Section 5 declares, *"That said taxes shall become due as soon as said demand is made, and, if they are not paid within sixty days from the demands made, there may be an action brought in the name of the State by the Attorney General and such counsel as the Counties interested may employ, against the Company in default, and any Company which may be in possession of the property which has escaped taxation, for the recovery of said taxes; and suit may be brought for each year separately, or for all the years consolidated."*

Section 6 limits *"The assessment herein provided for"* to 10 years, and declares *"that no recovery shall be had for a longer period than 10 years."*

Section 7 declares that *"the provisions of this Act shall not apply to any railroad property which may be hereafter adjudged by the courts to be exempt by law from the taxes which may be assessed against it under this Act."*

Section 8 declares *"That nothing herein contained shall be construed to impair the right of the State or any of its officers or agencies to collect such taxes in any other method provided by law."* (The other methods "provided by law" are distress warrant, levy, execution, and sale, *Civil Code of South Carolina*, Vol. I., p. 185.) The Act was approved the 19th day of February, A. D. 1900 (Transcript, fol. 14).

In May following, E. T. King, County Supervisor of Chesterfield County, petitioned the Secretary of State of South Carolina to convene the Railroad Board of Assessors in extra session pursuant to said Act to assess taxes on the Cheraw and Dalington Railroad, lying partly in Chesterfield and "the balance in Darlington and Florence Counties" for ten years prior

to 1899, alleging *"that prior to 1899 for more than thirty years the said road was left off the tax books and paid no State and County taxes"* (*Transcript, fol. 78*).

Thereupon, the said "Board of Railroad Assessors" convened in Columbia, S. C., for the purpose of assessing taxes on said road. Notice thereof had been given by the Secretary of State to this appellee, "The Atlantic Coast Line Railroad Company," which appeared before the Board by its counsel, who then and there objected to the juisdiction of said Board and exhibited and read to the Board certified copies of the decrees of injunction in the case of *"Pegues* vs. *Humphreys"* and *"Humphreys* vs. *Pegues,"* above set forth, and, protesting against the proceeding of the Board, filed a written objection thereto styled "Plea of the Atlantic Coast Line Railroad Company" (*Transcript, folio 47, fols. 80 to 86, and fol. 87*).

The Board of Railroad Assessors disregarded said protest and plea, and the decrees of the Circuit and of the Supreme Court of the United States, and proceeded, at the instance of W. F. Stevenson, claiming to be "Attorney for Counties Interested," to "assess" the Cheraw and Darlington Railroad for "taxes" (*Transcript, fol. 78*), and certified their "assessment" to the County Auditors of Chesterfield, Darlington, and Florence Counties, respectively. This "assessment" was, in the year 1900, entered by said Auditors in the tax books of their respective offices for each year separately, for ten years previous to 1899, that is, from the fiscal year beginning November 1, 1888, and the "taxes" were charged, as is claimed, under the general levies upon taxable property of the "State," which had been directed, for each of said years, by the supply bills of the General Assembly, sitting in each of said years (Transcript, fol. 88), and it is claimed by Appellants, that each of the sums *"so assessed became a just charge upon said property as soon as the assessment was made and the levy entered pursuant to the same"* (*Transcript, fol. 88*). Thereafter, on the 10th day of November, 1900, the Treasurer of said County demanded of the Agent of the Atlantic Coast Line Railroad Company, which company was then and still is in possession of the property, formerly owned by the Cheraw and Darlington Railroad Company, having acquired the same by consolidation with said Cheraw and Darlington Railroad Company, payment of said taxes," which payment was refused (*Transcript, fol. 88*).

Thereupon, "after the expiration of sixty days from the demands" so made, and in the year 1901, an action was brought in the Court of Common Pleas, of the State of South Carolina, for the County of Chesterfield, in the name of the State as

plaintiff, by the Attorney General thereof, and such counsel as the Counties interested employed, against *"The Cheraw and Darlington Railroad Company and The Atlantic Coast Line Railroad Company, defendants,"* upon ten separate causes of action, each, for the sum alleged to have been so "charged" for each of said ten years preceding the year 1899 (*Transcript, fol. 87-88*).

Similar actions were brought in Darlington and Florence Counties, these actions, in the whole, being upon thirty separate causes of action—ten years "taxes" for each of the above named three Counties—the sums so demanded for "taxes," so alleged to be "in default," aggregating the sum of *twenty-nine thousand eight hundred and seventy-seven & 57-100 dollars* ($29,877 57-100).

On the 2d day of October, 1901, The Atlantic Coast Line Railroad Company filed in the Circuit Court of the United States for the District of South Carolina, its Petition against G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson and Matheson; S. W. G. Shipp; I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina. All of said persons except the Atlantic Coast Line Railroad Company being citizens of the State of South Carolina.

Said Petition was filed in the cause and entitled *"In re,* Thomas E. B. Pegues, a citizen of Mississippi, Complainant.

vs.

R. J. Humphreys, a citizen of South Carolina, County Treasurer for Darlington County, John McCalla, a citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company.

Ex parte The Atlantic Coast Line Railroad Company, a citizen of Virginia.

vs.

G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson and Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Darlington County, South Carolina; J. O. McLendon, County Treasurer for Florence County, South Carolina. All said persons except the Atlantic Coast Line Railroad Company, being citizens of the State of South Carolina."

The title of the case has been changed on this Appeal by the

substitution of the name of U. X. Gunter, Jr., as Attorney General for that of G. Duncan Bellinger, retired, and appears as on the Transcript (fols. 123, 127, 130).

The Petition of the Atlantic Coast Line Railroad Company Transcript, fols. 10 to 17), prayed, "that, as the successor in ownership and interest of the Cheraw and Darlington Railroad Company, it may be allowed the benefit and protection of the said Decrees of the Circuit Court and of the Supreme Court, and due process to enforce obedience to the Decrees of the Circuit Court of 1871 and 1872 against the above named County Treasurers, as the present tax officials of the State, and against the said G. Duncan Bellinger, Attorney General, and the said Stevenson and Matheson, J. M. Spears and S. W. G. Shipp, plaintiffs' attorneys, requiring each of them to answer the petition, and that it may have a writ of Injunction issued from the Circuit Court, restraining the said officials, and also the said Attorney General and the said Stevenson and Matheson, J. M. Spears and S. W. G. Shipp, as plaintiffs' attorneys, from proceeding, under color of said Act of Assembly, and from prosecuting an action in the name of the State against The Cheraw and Darlington Railroad Company, and the petitioner, The Atlantic Coast Line Railroad Company, for the recovery of said amounts claimed as "taxes," and against each of the above named County Treasurers, enjoining and restraining them, and each of them, and any and all other persons, acting for or in the name of said State, from collecting all such amounts so claimed, and any other amounts, which may be claimed as taxes, in any method provided by law for the collection of taxes legally imposed" (*Transcript, fol. 16*).

A temporary injunction and rule to show cause was granted by the Circuit Judge in accordance with the prayer of the Petition, on the 2d October, 1901. (*Transcript, fol. 18.*) Returns to the Rule were filed by the respondents, W. H. Lawrence, as the Treasurer of Darlington County, by I. P. Mangum, as the Treasurer of Chesterfield County, by J. O. McLendon, as the Treasurer for Florence County, and by G. Duncan Bellinger, Attorney General, and by Stevenson and Matheson, J. M. Spears and S. W. G. Shipp, defendants' attorneys, showing cause and answering the Petition. (Transcript, fols. 21 to 34.)

Thereafter, on 18th and 19th November, 1901, the case was heard before his Honor, Nathan Goff, U. S. Circuit Judge, at Richmond, Va., "upon the petition and certified records of the Circuit Court for the Fourth Circuit, District South Carolina, and upon the return, answer and plea of respondents, and upon

affidavits and copies of the reports of Attorney Generals of South Carolina, and proceedings of the General Assembly of said State" (*Transcript, fol. 106*).

Thereafter, on the 16th January, 1903, his Honor, Nathan Goff, Circuit Judge, signed a Decree, which was entered in the Circuit Court, 16 January, 1903, in which "*the Court finds, that the questions, whether the property of the Cheraw and Darlington Railroad Company in South Carolina is entitled to exemption from taxation by the State of South Carolina by virtue of the grant contained in its amended charter, and whether the State would impair the obligation of its said contract by taxing said property, were finally determined by the Supreme Court of the United States on appeal in the cause, entitled 'Humphreys, tax collector, etc., et al., against Pegues,' reported in 16 Wallace, U. S. Rep., 244, and that the issues therein determined are res judicata and cannot be revived, or the decision questioned in any other proceeding. That if there was to be any modification, or reversal, of the result heretofore reached, it could only be made by the said Supreme Court.*

"*Also, that the injunction ordered in said cause on the 17th day of August, A. D. 1870, by the Circuit Court of the Fourth Circuit for the District of South Carolina against the tax officials of said State, is binding upon the Attorney General of said State and its tax officials of the present day, their predecessors and successors in office, and for all time and upon all persons claiming to exercise or enforce the taxing power of the State of South Carolina against the property of the Cheraw and Darlington Railroad Company; it is, therefore,*

"*Ordered, adjudged and decreed, that the rule issued in the case be, and the same is hereby, made absolute, and that respondents, G. Duncan Bellinger, Attorney General for the State of South Carolina; W. F. Stevenson, D. S. Matheson, Stevenson and Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; J. O. McLendon, County Treasurer for Florence County, South Carolina, and all other persons whosoever, claiming or to claim to represent the State of South Carolina, or the taxing power thereof, are hereby enjoined and prohibited from proceeding in the action begun in the name of said State by G. Duncan Bellinger, as Attorney General thereof, and his associates, the respondents above named, and from prosecuting any other action or proceeding whatsoever, or any distraint of property for the collection of money from the Petitioner, The Atlantic Coast Line Railroad Company, or its successors or*

assigns, upon the claim of taxes alleged to be due to the said State prior to the year 1899 by the said Company or by the Cheraw and Darlington Railroad Company in said State, or upon the claim of taxation prior to the year 1899, imposed by said State upon said property in the possession and ownership of the Cheraw and Darlington Railroad Company or in the control or possession of the Atlantic Coast Line Railroad Company." (*Transcript, fols. 106 to 109.*)

On 31 July, 1903, the following supplementary decree was signed by the Circuit Judge, and filed 8 August, 1903, to wit:

"Attention of this Court having been called to an interpretation put upon the decree of January 16, 1903, in above cause by respondents' counsel, in their Assignments of Errors, for appeal, viz: that the decree enjoins suit by the respondents for the portion of the taxes for the year 1898, accruing after the eighteenth day of July, 1898—the date when the claim for the exemption from taxation upon the property which was of the Cheraw and Darlington Railroad Company ceased—it is

"Ordered and decreed, that the words in the order for injunction, viz: 'year 1899,' occurring after the words 'prior to the' be erased and the words 'eighteenth day of July, 1898,' be inserted in lieu thereof; it is further ordered, that nothing in said decree contained shall be understood to enjoin the respondents or the taxing officers of the State of South Carolina from collecting by suit or otherwise any sum or sums of money, which may be due or charged for taxes after said eighteenth day of July, 1898, at which date it is admitted in argument, the exemption established in 'Pegues vs. Humphreys' was surrendered.

"(Signed) NATHAN GOFF,
"U. S. Circuit Judge."

(*Transcript, fol. 110.*)

This supplemental Decree of the Circuit Judge disposes of alleged errors in the Circuit Decree of January 16, 1903, charged in Appellants' *First* and *Second* Assignment of Errors.

ARGUMENT FOR APPELLEE.

Should the contention of Appellants in this case be sustained, it would become a question of vital concern to the public to know, whether this Court and the Circuit Courts of the United States have the power of protecting their Decrees, solemnly rendered, and acquiesced in for over thirty years, from contemptuous disregard by individuals, or State; and whether a conclusion, deliberately reached in 1873 by this Court, and proclaimed in its judgment, that certain property of a citizen is

APPELLANTS' FIRST ASSIGNMENT OF ERROR.

Transcript, folio 114.

"I. *His Honor, the Circuit Judge, having found that taxes for a part of the period embraced in the suit, to wit: from January 18, 1898, to December 31, 1898, were due and chargeable against the property of the Cheraw and Darlington Railroad Company, now owned by the petitioner, and were not stayed or affected by the original decree in Pegues vs. Humphreys, erred in granting any order restraining the prosecution of the action in the case of The State of South Carolina vs. The Atlantic Coast Line Railway Company, the principle being, that where any portion of the tax sued for is due, the Court of Equity will not restrain an action at law for the recovery of the same.*"

APPELLANTS' SECOND ASSIGNMENT OF ERROR.

Transcript, folio 115.

"II. *That under the admissions and proof before the Circuit Judge, under any view of the case, taxes were due from July 18th, 1898, to December 31st, 1898, and embraced in the said action which was enjoined, and the said Judge erred in restraining the State Attorneys when it appeared that anything was due, the principle being that a Court of Equity will not restrain suit if anything is due, unless it has been tendered.*"

The Circuit Judge has not found that taxes for any period were due and chargeable against the property. The record shows no such finding, as is alleged in Appellants' First Assignment of Error. There were no admissions or proof before the Circuit Judge that taxes were due from July 18, 1898, to December 31, 1898, or that such taxes were embraced in said action, nor did it appear that anything was due, as alleged in Appellants' Second Assignment, and the principle invoked in the assignments has no application in this case. Moreover, the Circuit Judge, in his Supplementary Decree, has judicially declared that he has not enjoined the collection of any taxes which may have become due after 18 July, 1898. (Transcript, folio 110, p. 68.)

exempt by law from all taxation by a State, is at the mercy, ever afterward, of experimental and unconstitutional legislation, or of professional persecution, and that such judgment may be set at naught, by disobedience of the positive injunction of the Courts, or by collateral attack, in another suit, no direct proceeding having been ever taken to obtain the reversal or modification of such Decrees.

APPELLANTS' THIRD ASSIGNMENT OF ERROR.

"III. *The Circuit Judge erred in holding that the case of Pegues vs. Humphreys and others was against all the tax officials of the State, when the record shows that it was only against the Treasurer of Darlington and Chesterfield Counties.*" (Transcript, fol. 115.)

It is admitted, that the case of *Pegues* vs. *Humphreys and others* was brought against the then Treasurers of Darlington and Chesterfield Counties, but we maintain, that it was a suit, which asserted the right of *The Cheraw and Darlington Railroad Company* to possess its property, exempt from the right and power of the State of South Carolina to impose taxes, State or County, upon it; that the State of South Carolina having entrusted the execution of its taxing power to certain officials, such officials, in such execution, necessarily stood for the State, and represented her whole personality in the assertion of her claim of right to tax the property threatened; that the case in 1870, in no possible sense, involved the individuality of R. I. Humphreys, who, at that day, happened to be the Treasurer of Darlington County, or of John McCalla, who happened to be the Treasurer of Chesterfield County; that it dealt with them wholly in their official relation, as "the tax officials of the State," representing the State in executing her taxing power, in asserting her right to tax the property in question and in defending the suit, in which the exemption was claimed on the one side, and denied on behalf of the State on theother. So that, if his Honor, the Circuit Judge, has said, that the case was "against the tax officials of the State," he was absolutely correct. If he had gone further and said, that the case was against the State herself, he would have been practically accurate. In no other way than by a suit to enjoin the execution of her taxing power by her official agents, could the issue as to her rightful claim to tax the property over against the rightful claim of its then owner (that its property was, under the State's contract, exempt from all taxation) have been judicially raised or determined. It was then very far from being a case "*only against*

the Treasurers of Darlington and Chesterfield Counties," as said in the appellants' third assignment.

We do not find anywhere in the Decree of the Circuit Judge, that he has said, "that the case of *Pegues* vs. *Humphreys and others* was against all the tax officials of the State" (as he is quoted to have said). What we do find him to have said, is this:

*"That the injunction ordered in said cause on the 19th day of August, A. D. 1870, by the Circuit Court of the Fourth Circuit for the District of South Carolina, against the tax officials of said State, which was on the 27th April, A. D. 1871, made perpetual, and as such, was affirmed by the Supreme Court of the United States on the 10th day of March, A. D. 1873, is binding upon the Attorney General of said State and its tax officials of the present day, their predecessors and successors in office, and for all time and upon all persons, claiming to exercise or enforce the taxing power of the State of South Carolina against the property of said Cheraw and Darlington Railroad Company; * * *"* (*Transcript, fol. 107*).

Can the case of *Humphreys* vs. *Pegues* be held to be otherwise than so binding? If it does not bind the State, in that it declares, in a suit in which the State was represented, that said property is, by her contract with the company, exempt from all taxation by her, and if binding the State, it does not bind all her tax officials and representatives, whom does it bind? Did it only bind personally R. I. Humphreys, who is dead, and John McCalla, who is dead? If R. I. Humphreys, "Tax Collector of Darlington County," against whom by name the injunction was directed, had died or resigned his office the next day after the Decree for Injunction of the Circuit Court was affirmed by this Court, and if a successor had been appointed, will it be said that the injunction would not have bound such successor? If it bound his immediate successor, it must have been because it had bound *Humphreys, ex officio*, as representing the State by virtue of his office, and so would it have bound all successors of Humphreys, and all other tax officials or representatives of the State in the exercising of her taxing power.

In accordance with the theory, that the case of *Pegues* vs. *Humphrey* was, virtually or practically, a suit against the State, the then Attorney General of the State came to Court as counsel for the tax officials, defendant, to defend the claim of the State to tax the property, contending, in their answer signed by him as "Attorney General of the State of South Carolina," that the charter, declaring the property exempt, was not a contract, which bound the State. By submitting the right of the State

to the judgment of the Court, the decision of the Court became binding on the State, and on all the tax officials and all persons representing her. (Transcript, fols. 63 to 66.)

APPELLANTS' FOURTH ASSIGNMENT OF ERROR.

"IV. *The Circuit Judge erred in holding that the judgment of the Court restraining the County Treasurer from proceeding to collect the taxes was binding on the State of South Carolina, whereas he should have held that a State is never bound by a judgment against its agents or officials, and can only be bound by the judgment of a Court in a cause where it consents to submit its rights, and such consent can only be given by the Legislature, and the Court had no power under the Constitution of the United States to bind the State directly or indirectly.*" (Transcript, fol. 115.)

Such was not the law in South Carolina in 1870-1871 and 1872, when the suit of *Pegues* vs. *Humphreys* was conducted on the part of the State of South Carolina by D. H. Chamberlain, her then Attorney General, or in 1873, when the decision of the Court was rendered in *Humphreys* vs. *Pegues,* and is not the law now.

At that date, August 6, 1870, when Pegues filed his Bill in the Circuit Court of the United States, the Act of Assembly of September, 1868, was in force, entitled an "*Act to fix the salary and define the duties of the Attorney General of the State,*" and Section 4 of said Act declared, that * * * "*when, in his judgment, the interest of the State requires, he shall be present at the trial of any cause in which the State is a party or interested* * * *" Also, there was then in force the Act of Assembly, approved February 28th, 1875, amending the Tax Laws of the State (*Statutes at Large of South Carolina, Vol. 14, p. 367*), of which Section 8 declared, "*It shall be the duty of the Attorney General of the State to defend any suit or proceeding against any Tax Collector or other officer, who shall be sued for moneys collected, or property levied on or sold on account of any tax* * * *." In the case of "*The State of South Carolina vs. Corbin & Stone, 16 So. Ca. Rep., 537,*" where the authority of the Attorney General to appear for and represent the State, without a previous special Act so authorizing or directing him, was called in question, his authority was upheld, the Court of last resort in South Carolina holding as follows:

"*But in addition to this, the Attorney General is especially required to defend the rights of the State in all cases where its rights are involved—General Statutes, 110 S. 35—* * *.*

But still, in addition, Attorney General Conner reported this action to the General Assembly; the same report was made by Attorney General Youmans after he took charge of the case. Even then, if legislative authority was required, the failure of the General Assembly to condemn or disapprove after two formal reports, on the familiar doctrine of principal and agent, would amount to a confirmation."

These citations are peculiarly applicable to this case.

Upon the filing, in the Circuit Court of the United States for the District of South Carolina, by Thomas E. B. Pegues, a stockholder in the Cheraw and Darlington Railroad Company, in August, 1870, his Bill of Complaint against R. I. Humphreys, County Treasurer for Darlington, and John McCalla, County Treasurer for Chesterfield County, claiming that the property of the Cheraw and Darlington Railroad Company was, by its charter, exempt for taxation by the State, and praying an injunction against said tax officials, restraining them from enforcing their execution against the property of said company for taxes of the State and County, the Honorable D. H. Chamberlain, then the Attorney General of South Carolina, appeared for said tax officers in said suit, filed their joint and several answers, which pleading was signed by him as *"Attorney General of the State of South Carolina, for Defendants,"* and, himself, made affidavit of verification thereto (*Transcript, fols. 63 to 65*), and as Attorney General, contended for the right of the State to tax the property of said company. In these answers the Attorney General squarely met the issue tendered by the bill as to the exemption claimed, denying that a contract between the State and the Company has been violated by the assessment and taxation under existing laws, of the property of the said Cheraw and Darlington Railroad Company, and claiming for the State the right to repeal, modify or amend any previously existing exemption from taxation *"as inherent and inextinguishable in the legislative authority of the said State"* (*Transcript, fol. 64*).

Fom the Decree of the Circuit Court, sustaining the exemption claimed and granting a perpetual injunction, the Attorney General of South Carolina entered an appeal to the Supreme Court of the United States, July 10, 1871 (*Transcript, fol. 71*), and the case was afterwards argued by him in this Court (*16 Wallace, 246*), after he had ceased to be Attorney General, but on the special retainer and request of his successor in the office of Attorney General of the State, the Hon. Samuel W. Melton. See *"Annual Report of Attorney General to the General Assembly of the State of South Carolina," December*

1st, 1873 (*Transcript, fols. 42 to 45*), from which we make the following extracts:

"*During the year, several cases, involving issues of vast importance to the State have been heard in the Supreme Court of the United States, a report of which would doubtless be acceptable to the General Assembly. Before that tribunal, the Attorney General of the State is not required by law to appear, nor can he do so with due regard to other duties; and it has been the custom in such cases, where matters of the greatest moment to the State are finally determined, to retain counsel learned in the law and of experience in that Court. This I had not been authorized to do by the General Assembly, and no fund for that purpose had been placed at the disposal of my office, whilst the civil contingent fund, to which I had looked for the purpose, proved to be unavailable. In this contingency, my predecessor, Hon. D. H. Chamberlain, who had conducted the cases below, and was fully possessed of them, consented, upon my own solicitation and that of the Governor, to appear in behalf of the State, and, without the usual advantage of associate counsel in Washington, conducted the several arguments with eminent ability and success. I have respectfully to ask that the General Assembly will approve my action, and recognize these services by a suitable and adequate appropriation.* * * *" After reporting specially the result of two other cases, which had been argued in like manner, at the same term, viz: that of *Reuben Tomlinson et al. vs. Thomas Branch et al.*, which "involved the right of the State to tax the property of the *South Carolina Railroad Company*," in which the State gained a partial victory, and that of *Reuben Tomlinson et al. versus Morris K. Jessup et al.*, which involved the right of the State to tax the property of the *North Eastern Railroad Company*, in which the Court affirmed the right of the State to tax the property of the company, the report of the Attorney General continues thus:

"*R. I. Humphreys et al., appellants, vs. Thomas E. B. Pegues, appellee. The same questions, involving the right of the State to tax the property of the Cheraw and Darlington Railroad Company, were presented in this case, which was argued in the Supreme Court of the United States at the same time with the two cases last preceding. The decision of the Court holds that this company is exempt from taxation by the terms of the charter.*"

The record shows, that the report of the Attorney General was received as information, ordered to be entered in the Journal, and, on January 26, 1874, "referred to the Committee

on the Judiciary." The Transcript does not show what action was subsequently taken, if any, upon the report. There is, however, no evidence that the action of Attorney General Chamberlain, in appearing in the Circuit Court of the United States in the case of *Pegues vs. Humphreys et al.,* for the State, in submitting her rights to the jurisdiction of that Court, and in taking the appeal in her behalf, was ever repudiated by the State of South Carolina, or that the action of Attorney General Melton, in employing the Hon. D. H. Chamberlain *to appear for the State* in the Supreme Court and there to prosecute, on behalf of the State, her appeal in that case was ever disapproved or disaffirmed by the Legislature of South Carolina. The legal presumption is, that both were approved and confirmed, and the doctrine declared by the Supreme Court of South Carolina in the case of *State of South Carolina vs. Corbin & Stone, 16 S. C., 536,* cited above, is conclusive of all question as to the State having by her Attorney General come into the Courts and submitted her rights to their jurisdiction. *"Even if legislative authority was required,"* say that Court, speaking of the act of the Attorney General, *"the failure of the General Assembly to condemn or disapprove after two formal reports * * * would amount to a confirmation."*

The subsequent history of over thirty years' acquiescence by the State, in not repudiating the action of the Attorney Generals, in 1870-1871-1872, and in refraining from taxation of the property of the Cheraw and Darlington Railroad Company (*Transcript, fol. 78*), is additional proof of such confirmation by the State, if any were needed.

That it was the settled opinion of the people of South Carolina and of their representatives in the legislative, executive, and judicial departments of the State government, after 1873, that the property of the Cheraw and Darlington Railroad Company was exempt from taxation by the State, as declared by this Court in *Humphrey & Pegues,* and that the title of that property to such exemption remained undisputed after that date, and was never questioned, until the inventive genius of this suit discovered an imaginary flaw in that title, is further shown, by the affidavit of James Norton, who was, from 1891 to 1894, Chief Clerk in the office of the Comptroller General of the State of South Carolina, and afterwards himself the Comptroller General of the State. (*Transcript, fol. 46.*)

Mr. Norton swears, that during the years 1891-1894, while *"he was Chief Clerk in the office of Comptroller General and Clerk of the State Board of Railroad Assessors, * * * when other railroad companies filed returns of their property for tax-*

ation, the Cheraw and Darlington Railroad did not do so, and when the matter was called to the attention of the company, the representatives thereof claimed that its property was exempt from taxation, and that it had been so decided by the Supreme Court of the United States, the opinion of the Attorney General being given to said board in session, as a member and adviser thereof, and during the years that deponent was Chief Clerk as aforesaid, and during the years that deponent was Comptroller General of the State of South Carolina, no further attempt was made by the tax department of the State to tax the property of said company, and the exemption of same from taxation was acquiesced in by said department, upon the oral advice of each succeeding Attorney General to the respective succeeding Boards of Assessors."

Therefore, it is not true in law, that "a State is never bound by a judgment against its agents or officials," nor is it true, that "in a cause wherein it consents to submit its rights * * * such consent can only be given by the Legislature," that is, by a special Act or previous consent, as is asserted or intimated by appellants in their Fourth Assignment of Error (*Transcript, fol. 71*); such consent, at least, by law of South Carolina, and as far as that State is concerned, may be given without a special Act of the Legislature, and may be given by her Attorney General, by virtue of his office, under the general powers conferred on him by law, and as we have seen, such consent may be given or evidenced by subsequent ratification or acquiescence.

APPELLANTS' FIFTH ASSIGNMENT OF ERROR.

"V. *The Circuit Judge erred in holding that all questions as to claim of an exemption, whether raised and litigated or not in the former case, were concluded by the judgment therein; whereas, he should have held that only such questions as were actually raised and litigated in the former suit are concluded in a subsequent suit for taxes for subsequent years, the same constituting a new cause of action. (Transcript, fol. 115).*"

The Assignment of Error does not quote the language of the Circuit Judge correctly. He has not held "that all questions as to claim of an exemption, *whether raised or litigated or not* in the former case, were concluded by the judgment therein." What he did hold is this (Transcript, fol. 106): "*The Court finds, that the questions, whether the property of the Cheraw and Darlington Railroad Company in South Carolina is entitled in law to exemption by the State of South Carolina, by virtue of the grant contained in its amended charter, and whether the*

State would impair the obligation of its said contract by taxing said property, were finally determined by the Supreme Court of the United States on appeal taken in said cause, entitled Humphreys, Tax Collector, etc., et al. against Pegues, reported in 16 Wallace, U. S. Rep., 244, and that the issues therein determined are res judicata, and cannot be revived or their decision questioned in any other proceeding. * *"

In this ruling, the Circuit Judge committed no error, nor was he called upon to use the language, which the assignment prescribes for him, as the proper holding, on a point not necessary to his judgment or put in issue in the proceeding.

APPELLANTS' SIXTH ASSIGNMENT OF ERROR.

(Transcript, fol. 116.)

"VI. *The said Circuit Judge erred in not holding that the case presented by the State was on a new and different state of facts from the case of Pegues vs. Humphreys et al., and new questions were raised, and that the State was in no wise bound as to such new questions and causes of action, and such injunction against her attorneys was improperly granted, and bound the State contrary to, and in violation of the Statutes and Constitution of the United States.*"

In view of the judgment of this Court in *Humphreys vs. Pegues*, affirming the immunity of the property, which was of the Cheraw and Darlington Railroad Company, from all taxation by the State of South Carolina, and ordering execution of the Decree of the Circuit Court, perpetually enjoining the tax officers, who represent the State, it was wholly unnecessary for the Circuit Judge, when application was made to the Court to enforce said judgment against State officers of the present day, who were proceeding to enforce taxation on said property, to enter into the questions, whether the suit for the collection of State taxes instituted by said officers was a suit based "on a new and different state of facts from the case of *Pegues vs. Humphreys et al.*, or on new causes of action, or between othe parties, or whether new questions were raised * * *" as suggested in Appellants' Assignment of Error. It was enough for the Circuit Judge to know, as he did from appellants' own admission, that the suit begun by the Attorney General and his associates was brought in the name of the State under an Act of the Legislature, which sought to assess and impose taxes upon the property, which the Supreme Court of the United States had declared to be exempt, and it was enough for the Court also, and at the same time, to know, that the Act was

illegal and void, and could not give lawful authority to the Attorney General or to any other person, to bring suit for the collection of taxes purporting to be assessed on that property of The Cheraw and Darlington Railroad Company.

It was enough for the Court to know, that, whatever new or different state of facts from the case of *Pegues vs. Humphreys* might be alleged by the Attorney General and his confreres in their suit, and upon whatever new causes of action they might base their suit, and whatever difference, in the parties plaintiff and defendant, there may be, between the suit brought by the Attorney General, in the name of the State, against the Cheraw and Darlington Railroad and the appellee, as owner and in possession of the property, on the one hand, and the suit of *Pegues against Humphreys et al.*, on the other hand, and whatever new questions were or might be attempted to be raised, the essential facts were undisputed, viz: that it was a suit in the name of the State to tax property declared exempt, and was brought (necessarily) in violation of the law and the Constitution, in disregard or contempt of the decree of this Court and the decrees of the Circuit Court and in disobedience of the injunction which this Court has sustained in *Humphreys vs. Pegues*, and, therefore, the injunction was properly granted by the Circuit Court in this case—in execution of the Decree of Injunction in *Pegues vs. Humphreys et al.*

APPELLANTS' SEVENTH ASSIGNMENT OF ERROR.

"VII. *The said Circuit Judge erred in restraining the attorneys of the State from proceeding when no trespass upon or interference with the property of the petitioner was contemplated, and they were only proceeding in the Courts to settle the rights of the parties in a judicial manner without interfering with the property of the petitioner in any way.*" (Transcript, fol. 116.)

The gentle cooing of this assignment is remarkable, when it is remembered, that the objective point of the attorneys' suit was the recovery, against appellee, of a judgment for the sum of $29,877 57-100, for which appellee was to be amerced by the Court, to be followed by execution, and liens upon any property which The Atlantic Coast Line Railroad Company, defendant, might possess in the States of South Carolina, North Carolina, Virginia or elsewhere, and, possibly, by a sale at public auction of said property.

The Act of 1900 provided (Section 2), for an unlawful "*assessment*" (Section 3), for an unlawful charge, of "taxes,"

on said assessment, under a pretended levy, made retroactively and arbitrarily on the tax books of the State (Section 4), for an unlawful demand for said "taxes" (Section 5), that said "taxes" shall become due as soon as said demand is made, and if not paid in sixty days from the demands made, there may be an action brought, in the name of the State, by the Attorney General and such counsel as the Counties interested may employ, against the company, in default; and any company which may be in possession of the property which *has escaped taxation* * * *"

The grievous imputation of "default," as that of a "delinquent taxpayer," whose property is to be considered as having "escaped taxation," is here added to the wrong of a proposed unlawful confiscation, under forms of law, which was blazoned in the words of the Act; and, in the face of this projected outrage, his Honor, the Circuit Judge, is said by appellant to have erred in restraining the attorneys of the State from proceeding *"where no trespass or interference with the property of the petitioner was contemplated, and they were only proceeding in the Courts to settle the rights of the parties in a judicial manner, without interfering with the property of the petitioner in any way"!*

"To settle what rights of the parties," may we ask? Had not the rights of the parties been definitely settled by the judgment of this Court in 1873, and had not the State acquiesced in that *settlement* for over thirty years? Had not the State of South Carolina, for that whole period, recognized the right of the company under the Constitution of the United States to possess its property, and to use it and dispose of it, free from taxation? Had not the State, for that period and more, under advice of all her law officers and advisers, treated it as *non-taxable* property, by not even placing it on her tax book?

APPELLANTS' EIGHTH ASSIGNMENT OF ERROR.

"VIII. *The Circuit Judge erred in holding that the Supreme Court of the United States alone could open and modify the decree of Pegues vs. Humphreys, when it is respectfully submitted, that it was in no wise binding on the State and her attorneys, and that there is no method open by which the said question can be brought to a hearing except by appeal, and to enjoin the attorneys prevents that from being possible.*" (Transcript, fol. 116.)

This assignment assumes that there is some ground of law or fact for opening and modifying the decree of *Pegues vs.*

Humphrey. The conclusive presumption of the law is otherwise and always and universally prevails in favor of the justness and legal correctness of a final Decree of a Court of competent jurisdiction, affirmed by the appellate *forum*, and acquiesced in for a time sufficient to give to its decision the force and sanctity of a rule of property. *Vanfleet on Collateral Attack, par. 534, p. 7. Ibid., 553, p. 5.*

If, during all those thirty years, any legal foundation could have been discovered for a motion to open or modify such decree, such as either mistake of law or fact, or after discovered evidence, it would have been competent for the State of South Carolina by her Attorney General to have essayed such motion in this Court, or in the Circuit Court of the United States. Never would it have been legally permissible to attempt to impeach such decree or to avoid it, or deny its force, by a collateral attack in another and different cause, before another tribunal, or in another jurisdiction.

APPELLANTS' NINTH ASSIGNMENT OF ERROR.

"IX. *The Court erred in not holding that the admitted facts that the decree in Pegues vs. Humphrey was based on the assumption that there was a consideration for the alleged contract between the State and the Cheraw and Darlington Railroad Company, to wit: the building of the road subsequent to the Act of December 19th, 1863, and that that was untrue and no such consideration existed made an entirely new case, and that under this state of facts the exemption, if any was granted, was only a gratuity and could be revoked and had been repealed by the Constitution and laws of the State.*" (Transcript, fol. 116.)

It is not *"the admitted facts"* in this case, that the decree in *Pegues vs. Humphrey* "was based on the assumption," that the building of the Cheraw and Darlington Railroad Company was subsequent to the Act of December, 1863, nor was that decree, in point of law, "based upon" the consideration of the road being built subsequent to the Act of December 19, 1863.

Assuming, for the sake of argument, that such subsequent building was erroneously supposed by the Court to have been a fact, and to have entered into the consideration, or formed a part thereof, it did not constitute a material or essential part of the consideration of the contract, which was adjudged to exist, between the State of South Carolina and the Cheraw and Darlington Railroad Company, *by virtue of the amended charter*. The actual building of the road constituted a small

part of the consideration of the charter granted by the State. The principal "consideration of the contract" was the benefit to accrue to the public from the establishment and *continued maintenance* of a great highway of commerce and travel; and the equipping of the railroad *after* it was built, and the keeping it up and conducting it in the future, for the convenience and accommodation of the public, bore to the mere completion of its road bed, a vast disproportion in importance, in an estimate of the relative potency of the items of "consideration," which the State is presumed to have had in view in granting the exemption from taxation.

If it were a fact, that the road bed itself was actually completed and that the rails were laid and cars were run on the road before the exemption was granted, it is to be presumed that the Legislature in 1863 knew that such was the fact, and if, in the face of such known fact, the Legislature saw fit, in consideration of that fact, *and* of the subsequent equipment and future maintenance of the road, and the future conduct of its business as a highway for the public convenience and benefit, to grant the exemption, the "consideration" for the contract would be as complete as if the actual building of the road had been subsequent to the date of the grant.

The charter having been granted by the Legislature, the consideration for the grant is presumed, as matter of law, and it was not and is not an open question for the Courts to inquire into the elements, which may or may not have entered into such consideration in the minds of the legislative authority, or to base their judgment exclusively upon any one or more of such elements of the consideration of the charter granted. Upon this principle rests the rule, that it is never necessary for the Court to look into the consideration of a charter by a State or to require proof of such consideration.

In *Home of the Friendless vs. Rouse, 8 Wall, 430*, it was declared, *"There is no necessity of looking for the consideration of a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this Court on this subject since the case of Dartmouth College vs. Woodward. * * * And it is equally well settled, that the exemption is presumed to be of a sufficient consideration, and binds the State if the charter containing it is accepted" (New Jersey & Wilson, 7 Cranch, 164; Gordon vs. Appeal Tax Court, 3 How., 133; Piqua Bank vs. Knoop, 16 Ib., 369; Ohio*

Fund Co. vs. Debolt, 16 Id., 416; Dodge vs. Woolsey, 13 Id., 331; Mechanics & Traders Bank vs. Thomas, Id., 384; Mechanics & Traders Bank vs. Debolt, Ib., 380; Gee vs. Matthis, 4 Wallace, 143).

If it were a fact, that the road was built *before* the Act of the Legislature was paased, and if the decree of the Court had been based upon the assumption that the road had been built subsequent to the Act, the decree would nevertheless stand, upon the basis so adjudged, until the decree shall have been modified or reversed. This, according to the fixed rules of law, could only be accomplished by a motion, to correct the alleged mistake of fact, made in the cause, and in the Court, in which such decree has been rendered, in a direct proceeding expressly shaped to that end. Such a decree, even if based upon a mistake of fact, cannot be set aside or impugned upon evidence *dehors* the record of that cause, or indirectly, or by a proceeding in any other *forum* or cause.

*"For all the cases agree that a record of a domestic Court of general jurisdiction cannot be overturned in another action by matter dehors the record, and such an attempt, when the sole object is to declare the judgment void and not to get a review or new trial for newly discovered evidence, or to set it aside under the rules of equity, is always a collateral attack." Vanfleet on Collateral Attack, p. 5-34, p. 7. "A collateral attack on a judicial proceeding is an attempt to avoid it or to deny its force or effect in a manner not provided by law." Ib., 553, p. 5. "A late case in Oregon thus defines a collateral attack, 'an attempt to impeach a decree in a proceeding not instituted for the express purpose of annulling or correcting or modifying the decree or enjoining its execution,' Morrill vs. Morrill, 20 Or., 96, 12 Am. Eng. Encyl. of Law, 1441." * * * "As all judicial records must be tried by inspection, an attempt to overturn them by evidence dehors in a proceeding not provided by law, is a collateral attack." S. 3, p. 5. "The record of a Court can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be disastrous in its results, * * * hence all records must be tried and construed by themselves."*

Appellee, however, is very far from admitting that either the decrees of the Circuit Court in *Pegues vs. Humphreys*, or the decision of this Court in *Humphreys et al. vs. Pegues*, *"was based upon"* the fact, that the Cheraw and Darlington Railroad was built subsequently to the Act of December 19th, 1863.

The record, we admit, does show that in the bill of complaint

of *Pegues,* filed in the Circuit Court, August 6, 1870, the following sentence occurs, to wit (Transcript, fol. 49):

*"That before the construction of said railroad under its charter by an Act of the General Assembly of South Carolina, passed the seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty-three, Section 5 of the above first named Act was amended * * *."*

The bill goes on to state the purport of the amendment which contained the grant of the exemption from taxation, which the Court has since sustained as a contract binding upon the State.

The record also shows that the joint and several answer of the defendants, filed by the Attorney General, does not controvert the allegation of fact, that the Act of 1863 was passed "before the construction of said railroad under its charter." It is apparently ignored, whether intentionally, because it was thought to be a matter immaterial to the issue, or inadvertently, or by mistake, cannot now be known. The material averments of the bill were, however, fully answered and the substantial issues were met in the answer as follows, to wit (*Transcript, fol. 63*):

"XI. *These defendants, further answering, say, that it is true, as set forth in the bill of complaint, that the said Cheraw and Darlington Railroad Company is a body corporate by the laws of said State, doing business therein under a charter conferred by an Act of the General Assembly of the State, and the amendment thereto, and that the property of said corporation lying within the said State has been assessed for taxes in the manner set forth in the said bill of complaint, &c. * * *.*"

The answer, then, as we have stated, proceeds to meet the issues of law presented by the bill, claiming, among other defences, *"That no contract between the said Cheraw and Darlington Railroad Company and the said State has been violated by the assessment and taxation under existing laws of the property of said Cheraw and Darlington Railroad Company, &c. * * *."* (*Transcript, fol. 64.*)

Issue was joined upon the allegations of the bill, which had been controverted by the defendants, which issues were wholly matters of law, and there is no evidence in the record that the Circuit Judge "based" his decree in *Pegues vs. Humphreys* upon the allegation of the complaint, that the Act of 1863 was passed *before* the construction of said road under its charter, or that that allegation bore any weight in the conclusion which the Court reached upon the issues of law which were involved, and which constituted the real basis of the decree.

Subject to the reserved right to object to said "facts" being used as evidence, as not relevant or pertinent to the issues involved in the case, the attorneys on behalf of the petitioner and respondents in the case agreed to certain facts as admitted among them. "It is admitted, that the Cheraw and Darlington Railroad Company was organized and completed its road from Florence, S. C., to Cheraw, in December, 1855" (*Transcript, fol. 34*).

In making this admission, we do not for appellee admit, that the judgment of this Court on appeal in *Humphreys et al. vs. Pegues* was "based upon" the assumed fact that the road was built subsequent to the Act of 1863.

We contend, to the contrary, that the judgment of this Court affirmed the judgment of the Circuit Court, and was based upon the issues there presented, viz: the claim to the exemption, granted to the company, on the one side, and the denial of such exemption as a binding contract by the State, on the other.

It is also true that, in delivering the opinion of this Court in the case of *Humphreys vs. Pegues*, his Honor, Mr. Justice Hunt, says: "*The road was soon afterwards built,*" but he adds, "*and has since then been and now is in operation. These facts serve to show, first, that there was in this instance the consideration, that at any time exists for the granting by the Legislature of such privilege to aid the acceptance of the same, and the building of the road; and secondly, the intention of the Legislature by omitting a reference to the original Act of incorporation to grant all the powers and privileges that had been at any time conferred upon the North Eastern Company.*"

Clearly, all this is said by the distinguished Justice, *arguendo*, by way of illustration of the principle of such grants of exemption to railroad companies. He does *not* say, that the building of the road was the *sole* consideration for the contract by the State; or that it was ever necessary to show in grants by charter evidence of consideration, nor does he say, that the judgment of the Court is "based upon" that fact, as the appellants here contend. On the contrary, the sentences of the opinion by Mr. Justice Hunt, which precede, as well as those which follow the words quoted above, all show that the true basis of the judgment of the Court was the question, whether *by the terms of the Acts* of the Legislature, *upon the interpretation of which the case turned*, an exemption was granted, and if so, whether it was a contract between the State and the company, which by the law of South Carolina the State could not repeal.

The preceding sentences of the decree are as follows,

(p. 248): *"Whether it be said that the rights and privileges conferred upon the North Eastern, as they stood in 1863, existed in its charter or were derived from its incorporation, amounts to the same thing. We have no doubt that all of them were intended to be granted to the Cheraw Company by the Act of that year. The charter or incorporation, of 1851, had been amended in 1855, and by an Act, which purported in its title not to create an original authority, but by amending the original charter to bestow additional powers upon the company. After the passage of the amended Act, the North Eastern was, in law, as if it had originally been chartered with all the rights, powers and privileges conferred upon it by the Act of 1855. Such was the legal effect of the amendment; and such, no doubt, was the understanding of its effect by the Legislature of South Carolina when, in 1863, they conferred all its powers and privileges upon the Cheraw Company."*

These words embody the true "basis" of the decision of this Court. Mr. Justice Hunt then goes on, as follows:

"The case shows that from 1849 to 1863, no sufficient inducement had been formed to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it, in addition to the exemption we are considering. *But this exemption was conferred;* an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, &c.," as quoted above.

Suppose, that some one had been at the elbow of the Justice, when he was writing his opinion, and, mistaking the true point of his discussion of the case, had, at this juncture, interposed, saying, "but, Mr. Justice, the road had already been built in 1863, when the grant was made," what would have been his reply? Would he have said, "That makes a wholly different case. I must bring my brethren of the Court together and call that fact to their attention, in order that they may change their decision?" On the contrary, would he not have instantly said, "That fact could make *no* difference in the result, nor change the conclusion of the Court, which rests on the words of the Act granting the exemption and the laws of South Carolina, which the Court has considered and interpreted." Might he not have added, "The equipment, or that portion of the equipment of the road, which was subsequent to the grant of the exemption in 1863, and the subsequent yearly maintenance of the road, and of its equipment, and the expense of running it, and the hourly benefit to the public, after 1863, as a public highway of

commerce and travel, were, far more than the mere building of the road, the inducement which presumably prevailed with the Legislature, and they constituted considerations amply sufficient to justify the Legislature in making the grant and amply sufficient to support the contract?" And might he not well have replied, still further, that "A charter from a Legislature of a State, when accepted, presumes a consideration; besides which, of the amount and sufficiency of the consideration for a charter or grant, the legislative department of the government is the exclusive judge, with whose province the Courts never interfere." *Home of the Friendless vs. Rouse, 8 Wallace, 430,* and cases cited *supra,* on page 24.

APPELLANTS' TENTH ASSIGNMENT OF ERROR.

"X. *The said Circuit Judge erred in not holding that the terms used in the Act of December, 1863, were not sufficient to confer an exemption from taxation on the Cheraw and Darlington Railroad Company, and that such was not conferred.*"

The complete answer to this assignment of error is, that this Court, in *Humphreys et al. vs. Pegues, 16 Wall, 244,* expressly decided, that the terms of the Act of 1863 were sufficient to confer an exemption from taxation on the Cheraw and Darlington Railroad Company, and that such exemption was conferred; and, as that decision has not been overruled or modified, the Circuit Judge correctly held that those questions are *res judicata.*

APPELLANTS' ELEVENTH ASSIGNMENT OF ERROR.

"XI. *The Court erred in not holding that there was plain and adequate remedy at law, and there was no particular ground for the interference of the Court of Equity.*" (Transcript, fol. 117.)

If this had been a case of a bill in equity, brought for the original purpose of enjoining a suit, the question might have been made as to whether the complainant in such bill had or had not a remeedy at law, but as this is simply a proceeding in execution of a decree in equity already rendered in an injunction suit, there is no place for such inquiry, and the suggestion, that the plaintiff in execution had a plain and adequate remedy at law, has no pertinence to the case, and comes entirely too late.

It would certainly be a most extraordinary proposition, that a Court of Equity, engaging in giving a party in interest the

benefit of a decree, long since rendered, and proceeding to execute such decree of injunction, may have its arm arrested, in the act of enforcing obedience to its judgment by a plea of "a plain and adequate remedy at law." No remedy at law could be as plain, or as adequate to the desired end, as the Court's own process of execution of its own decree.

APPELLANTS' TWELFTH ASSIGNMENT OF ERROR.

"XII. *The Court erred in enjoining the attorney of the State, for the reason that it thereby in effect enjoined the State of South Carolina from proceeding in her cause, making this in effect a suit against the State, and it was without power to hear and determine the same.*" (Transcript, fol. 117.)

A legal proceeding against persons, who are using their official character as State officers in acting or attempting to act in the name of the State, by bringing a suit, under the pretended authority of an Act of a Legislature, unconstitutional and void in its intent, cannot be held to be a suit against the State, in effect or in form. Such would be true, if this were an original bill in equity, seeking to enjoin the parties so claiming to represent the State from bringing their suit in the State Court. But, as we have seen, it is not even such a case, and on the contrary is simply an application to the Court seeking the benefit of a decree already rendered, and asking the Court to cause its own decree to be respected by executing the same, and is a proceeding *auxiliary* to such decree, and *ancillary* to the suit of *Pegues vs. Humphreys et al.*, in which said decree was rendered.

In the case of *Tindall vs. Wesley* (*167 U. S., 204*), *17 Sup. Court Ref., 77*, it was said:

"The cases in this Court in which it has been necessary to consider the meaning and scope of the Eleventh Amendment are quite numerous. In *Pennoyer vs. McConnaughty* (*140 U. S., 1 to 10*), *11 Sup. C. Rep., 701*, the opinion in which was delivered by Mr. Justice Lamar, the cases previously decided were examined and were held to belong to two classes. The first class, &c., * * * (citing *In re* Ayres, 123 U. S., 143, and others * * *)."

"The other class," the Court said, "*is where a suit is brought against defendants, who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, acquired by it under a contract with the State. Such suit, whether brought to recover money or property in the hands of*

such defendants, unlawfully taken by them, in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is inadequate for injunction to prevent such wrong and injury, or, for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State," citing Osborn vs. Bank, 9 Wheaton, 738; Davis vs. Gray, 16 Wallace, 400; Litchfield vs. Webster Co., 101 U. S., 773; Allen vs. R. R. Co., 114 U. S., 311, 5 Sup. C. Rep., 925-962; Board vs. McComb, 92 U. S., 531; Poindexter vs. Greenhow, 114 U. S., 270; 5 Sup. Ct., 903-962 * *.*

In re Ayres, 123 U. S., 443, on page 500 (lower half), it is said by this Court: "*In pursuance of the principles adjudged in the case of Osborn vs. Bank of United States (supra), it has been repeatedly and uniformly held by this Court that an injunction will lie to restrain the collection of taxes, sought to be collected by seizing of the property, imposed in the name of the State, but contrary to the Constitution of the United States, threatening the distraint complained of. The grounds of the jurisdiction in all such cases is that the defendants, though professing to act as officers of the State are threatening a violation of the personal property and rights of the complainant for which they are personally and individually liable. The principle was plainly stated in the opinion of the Court in Poindexter vs. Greenhow, 114 U. S., 270.*"

APPELLANTS' THIRTEENTH ASSIGNMENT OF ERROR.

"XIII. *The Court was without power to proceed against these appellants, for the reason that they were acting purely for and as agents of the State in whose behalf and interest the action sought to be stopped was being prosecuted, and the proceeding was in effect against the State, and could not be maintained without its consent.*" (Transcript, fol. 117.)

This assignment of error is little more than a repetition of the previous assignment (XII.), in our argument upon which we have met, by authority, the rather bold proposition that the Circuit Court, which is the custodian of its own decree, and of the mandate of this Court directing its execution, is "without power to proceed against appellants" in enforcing such execution of its decree; and "for the reason" that appellants were "acting purely for and as agents of the State of South Carolina * * *"

We have no hesitation in denying that appellants were or are "acting purely as agents of the State," in bringing a suit in the name of the State for the collection of "taxes" against the property which was of the Cheraw and Darlington Railroad Company, now in the possession and ownership of the appellee. The only warrant for such action on the part of the appellants, who claim to be officers of the State, is the Act of the Legislature, above quoted. This Act, as we have shown, is wholly unconstitutional and void, if applied to the Cheraw and Darlington Railroad or its property, in that it proposes to impose taxes on property, which this Court has decided to be exempt from taxation. This void statute could give no lawful authority to the respondents, the Attorney General or his associates, to use the name of the State as plaintiff, in such suit, or authority to them to act as agents of the State, or for her, or for her benefit. They, therefore, are not, and cannot claim to be, the agents of the State, or to be acting in her behalf, or in her interest, in bringing such suit for the collection of taxes against the appellee or against its property.

Where a Court, upon inspection of a given statute, invoked as authority for acts injurious to rights of person or property, finds that it violates the Constitution and impairs the obligation of a State's contract, and, as in this case, boldly defies the solemn judgment of this Court, declaring that certain property under such contract is exempt from taxation, the Court will not hesitate to declare such statute void and incapable of giving legal authority to any one. Again, the Court will not assume, that it was the deliberate purpose of the Legislature to violate the Constitution and the law as declared by the Court, or to act in contempt of its mandate, but will rather assume that the legislative body has been imposed upon by those who have successfully, but unworthily, engineered the unconstitutional statute through the processes of legislation.

The action sought to be stopped by this proceeding was, therefore, not being prosecuted by the State, nor by her authority, nor on her behalf, nor in her interest, nor by her authorized agents; and this proceeding, taken in execution of the decree of the Circuit Court and of the mandate of this Court, is not a proceeding against the State, and does not require her consent, but is a proceeding simply against persons who are attempting unlawfully to use the name of the State in imposing upon property, exempt from taxation, an unlawful assessment and taxation, and in attempting to collect such so-called "taxes." It will be noted, that the Act of Assembly, claimed by the respondents-appellants as their authority, does not name the

appellee, The Atlantic Coast Line Railroad Company, or the Cheraw and Darlington Railroad Company, and uses general terms in its title, and in its first Section, as if it was directed impartially against all railroads of the State of South Carolina, the title of the Act being *"An Act to provide for the assessment for taxation of railroad property which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due, and for the collection thereof;"* and the first section of said Act declaring as follows: *"Section 1. Be it enacted by the General Assembly of the State of South Carolina. That when railroad property has not been returned for taxation nor assessed for any year, and no taxes were paid thereon, and more than a year has elapsed since taxes for such years, if assessed at the proper time, would have been due, the said taxes shall be assessed by the railroad board of assessors, which shall be convened in extra session by the Secretary of State for such purpose, on the petition of any County Supervisor, in whose County any part of such railway may lie."*

There was nothing in the language of the title of the Act of 19th day of February, A. D. 1900, nor in its first Section, to indicate to the Legislature, to whom the Bill was presented for enactment, that the exempted property of the Cheraw and Darlington Railroad Company, or its successor in ownership and possession, The Atlantic Coast Line Railroad Company, was intended, or that it was the sole railroad property in South Carolina against which the provisions of the Act were aimed; and the evident purpose, by using the very general phraseology above quoted, to conceal from the view of the members of the General Assembly the fact, that the exempted property which was of The Cheraw and Darlington Railroad Company, was the single railroad property in the State contemplated by the authors of the legislation, is palpably apparent. It is very easy to see that by this unfair device, the eyes of the members of the General Assembly were blinded, and to comprehend that the Legislature, did not understand, that, in legislating for the retroactive imposition of assessment and taxation on railroad property generally which had been off the tax books, they were being entrapped into a violation of the Constitution, and into a defiance of the judgment of this Court, and were being made to attempt to impose taxation upon property exempt by law. It is not shown or suggested that any attempt has been made to apply said Act to any other railroad in the State, or to bring suit against any other railroad than the appellee for the collection of taxes, because of its property "having been off the

tax books," or "not returned nor assessed for any year, and no taxes were paid thereon;" and we have the testimony of ex-Comptroller General Norton (*Transcript, fol. 46*), that during the years 1890 to 1894, while he was Chief Clerk of the Comptroller General, and during the subsequent years, when he was the Comptroller General of the State of South Carolina, *all other railroads in the State filed returns of their property for taxation,* but that the Cheraw and Darlington Railroad Company did not do so, also that its claim of exemption from taxation was sustained by the then Attorney General of the State, and by the then railroad board of assessors, and *"that thereafter during the years that deponent was Chief Clerk as aforesaid, and during the years that deponent was Comptroller General of the State of South Carolina, no further attempt was made by the tax department of the State to tax the property of said company, and the exemption of same from taxation was acquiesced in by said department, upon the oral advice of each succeeding board of assessors."*

It is, therefore, impossible to escape the conclusion, from this state of facts, that the Legislature of 1900 was deceived and imposed upon by the authors of the Act; that the General Assembly of South Carolina never advisedly intended that said Act should apply to the property of the Cheraw and Darlington Railroad Company, which had never, since 1863, been on the tax books, and its property, therefore, could not be said "to be off the tax books," improperly or unlawfully, or be correctly described as having, thereby "escaped taxation" unlawfully.

The Court must, therefore, conclude, that the Act of February, 1900, has no application to the Cheraw and Darlington Railroad Company or to its exempted property found in the ownership and possession of the appellee, the Atlantic Coast Line Railroad Company; and, further, that said Act furnished no warrant of authority to the appellants for the suit for collection of taxes, which they have attempted to bring against appellee and against said property, and which suit has very properly been enjoined by the Circuit Court in this proceeding, as not a suit which can be lawfully prosecuted by the State or her officials.

APPELLANTS' FOURTEENTH ASSIGNMENT OF ERROR.

"XIV. *The Court erred in that it in effect has enjoined the State from prosecuting its action for taxes in its own name, which said Court has no power to do under the eleventh amendment to the Constitution of the United States and under the*

Revised Statute of the United States, Section 720." (Transcript, fol. 117.)

We have already fully shown that the Court has *not* "in effect enjoined the State," in enjoining the respondents-appellants; nor "enjoined the State from prosecuting its action for taxes, in its own name," by enjoining the action brought by the respondents-appellants, but has simply enjoined those who were attempting to abuse the State by using her name in a suit, which she could not herself lawfully prosecute, and which she has not authorized to be brought in her name. We have shown, that the State could not, in the face of the contract which this Court has held to be binding upon her, exempting the property of the Cheraw and Darlington Railroad Company from taxation, herself prosecute an action for taxes, and could not authorize any other person to prosecute such action in her name. We have also shown that the State has not authorized such action to be brought, and that the only authority which respondents-appellants claim for their attempt to prosecute against appellee an action in the name of the State for the collection of taxes, is an unconstitutional and void Act of the General Assembly, which gave no lawful authority to respondents, and was not the act of the State. From what we have shown, it appears, also, that the monies which the appellants were attempting, by a suit in the name of the State, to collect from the appellee were not "taxes" in any legal sense; were not "taxes," lawfully assessed or imposed under the Constitution of the State of South Carolina, or under the Constitution of the United States; but were so-called "taxes," illegally assessed, and unlawfully imposed, in violation of the Constitution of the United States.

APPELLANTS' FIFTEENTH ASSIGNMENT OF ERROR.

"XV. *The Court erred in that it held the State bound by a decree in Pegues vs. Humphreys et al., to which the State was not a party, and in which the Court would have been without jurisdiction, and the decree a nullity if the State had been a party.*" (Transcript, fol. 117.)

We have already met the position that the State was not a party in *Pegues vs. Humphreys* in considering appellants' "*Fourth Assignment of Error*," *supra*, and it would be only "to thrash over old straw" to follow appellants' reiteration of the same fallacy.

The assignment does not indicate how the Court would have

been without jurisdiction, or "the decree a nullity if the State had been a party." The authorities all show the contrary of such proposition.

APPELLANTS' SIXTEENTH ASSIGNMENT OF ERROR.

"XVI. *The Court violated Section 720, of the Revised Statute of the United States, prohibiting United States Courts from enjoining proceedings in State Courts, and it thereby erred.*" (Transcript, fol. 117.)

The authorities fully answer this assignment of error.

"*It is now thoroughly settled that the statute forbidding the Federal Courts to enjoin proceedings in a State Court, does not apply to proceedings incidental to jurisdiction properly acquired by a Federal Court for other purposes, than that of enjoining proceedings in a State Court. (Garner vs. Second Natl. Bk., 33 U. S. App., 91, 67 Fed. Rep., 833; Central Fruit Co. vs. St. Louis A. T. Ry. Co., 59 Fed. Rep., 385; Terre Haute & G. R. Co. vs. Peoria etc. R. R. Co., 82 Fed. Rep., 943.)* To these may be added (*Fisk vs. The Union Pacific R. R. Co., 10 Blatchford, 518; Wagner vs. Drake, 31 Fed. Rep., 849; Sharon vs. Terry, 36 Fed. Rep., 337; French vs. Hay, 22 Wall, 250; Deitzsch vs. Huidekoper, 103 U. S., 494*). See notes to Section 240 (720), *Desty's Federal Procedure* (9 Ed., p. 802)."

"* * * *its interpretation*" (that is, Section 720, U. S. Statutes), "*is restricted by Section six hundred and forty (640) and six hundred and fifty-six (656) of the Revised Statutes, to cases where the jurisdiction of the Courts of the United States is originally invoked for the purpose of staying proceedings in the State Courts (Perry vs. Sharpe, 8 Fed. Rep., 24).*"

"*A Court of the United States is not prevented from enforcing its own judgments by the statute, which forbids it to grant a writ of injunction to stay proceedings in a State Court.*" *Dietzsch vs. Huidekoper, 103 U. S., 494.*

That was a case,

"*Where a judgment by defendant in replevin was obtained in a State Court, after the case had been removed to the United States Court and judgment there entered, a suit was then begun in the State Court on the replevin bond. Thereupon Huidekoper and others filed a bill to restrain Dietzsch and others from proceeding with their suit in the State Court.*"

An injunction was ordered.

The Supreme Court, by Mr. Justice Woods, declared as follows:

"The suit upon the bond was, therefore, but an attempt to enforce a pretended judgment of the State Court, rendered in a case over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court by a judgment in favor of plaintiffs in replevin. The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal Court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who by the judgment of the Court were entitled to it, or what was the same thing, preventing them from enforcing a bond for the return of the property to them.

*"A Court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court * * *.*

"As the bill in this case is filed for the purpose of giving to litigants on the law side of the Court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to a suit at law, and the Court had the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when he may attempt to evade it, or escape its effect, unless by direct proceeding. These views are sustained by the case of French Trustee vs. Hay (22 Wall, 250), between which and this case there is no substantial difference."

In Davis vs. Gray, 16 Wall, 203, the doctrines of *Osborne vs. The Bank of the United States, were affirmed and the principles redeclared.*

*"That a Circuit Court of the United States, in a proper case, in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a Statute of the United States, when such execution will violate the rights of the complainant." * * * "Where a State submits itself without reservation to the jurisdiction of a Court in a particular case, that jurisdiction may be used to give full effect to what the State, by its submission, allowed to be done, and if the law permits coercion of public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose." Louisiana vs. Jumel, and Elliott vs. Watts, 107 U. S., 711.*

"Although the Circuit Court has no jurisdiction over the proceedings in a State Court, yet the Section does not prevent it from releasing a defendant from process of a State Court, violating its protection, or to prevent abuse of its privileges (Bridges vs. Sheldon, 18 Blatchf., 517; S. C., 7 Fed. Rep., 45, Hurst's Case, 4 Dall., 387)."

"So, a Circuit Court may restrain parties from taking out criminal process under a State law which impairs the obligations of contract (Louisiana State Lottery Co. vs. Fitzpatrick, 3 Woods, 222; Fed. Cases No. 8541)."

"A Federal Court may restrain proceedings on a suit in a State Court," the injunction being merely an ancillary proceeding, and not forbidden by the Section. (Sec. 720.) Kern vs. Huidekoper, 103 U. S., 485.

"Relief in equity has been granted where taxes are levied under a void law, contrary to the XIV. Amendment as against due process of law—Coulsor vs. Portland Deady, 481. Again, in a case of a tax upon property exempt from taxation." City National Bank of Paducah vs. Paducah, 2 Fillp, p. 61.

"Where an illegal tax upon personal property was imposed, the law imposing the tax being void, an injunction was issued." Union Pacific Co. vs. Ryan, 113 U. S., 516.

Relief by injunction where the tax upon property declared by the Supreme Court to be exempt. (See cases 22, Lawyers' Reports Annoted, p. 703. Notes at the bottom of right hand column.)

APPELLANTS' SEVENTEENTH ASSIGNMENT OF ERROR.

"XVII. *The Court erred in holding that the State can be bound by a decree against one of its tax officials, when it could not be bound by a decree against itself, unless by legislative action it submitted itself to the jurisdiction, and the said Court had no power to make such decree binding on the State, in this way, under the Constitution and laws of the United States.*"

Suffice to say, that the Circuit Court has not held, in language of the assignment, that "the State can be bound by a decree against one of its tax officials, when it could not be bound by a decree against itself." We have amply shown, above, that a State may be bound by a decree against one of its tax officials, where her rights have been, authoritatively, submitted to the jurisdiction of the Court (*supra, p. 37*); *Also*, that this may be done, without a special legislative Act. It is scarcely necessary to notice the suggestion, "that the said Court had no power to make such decree binding on the State, in this way, under the Constitution and laws of the United States." If by "said Court" is meant the Court from whose judgment this Appeal is taken, the answer is, that said Court has not made such decree, of 1870-1873, binding; such decree was binding by virtue of the authority of the United States

Circuit and of the Supreme Court, when the latter issued its *mandate* in 1873, and the Circuit Court, from whose order the Appeal is taken, simply executes the final decree of the Circuit Court, of 1871, of perpetual injunction, against attempts of the State of South Carolina, to tax the exempted property.

J. T. BARRON,
Counsel for Appellee.

With whom are THEODORE G. BARKER and P. A. WILLCOX.

OPINION

Supreme Court of the United States.

No. 88.—October Term, 1905.

U. X. Gunter, Jr., Attorney General of the State of South Carolina, et al., Appellants, vs. The Atlantic Coast Line Railroad Company.	Appeal from the Circuit Court of the United States for the District of South Carolina.

[January 15, 1906.]

Mr. Justice White delivered the opinion of the Court.

Before analyzing the facts particularly bearing upon the legal questions for decision, in order to a comprehension of those questions we summarize in their chronological order matters which are undisputed concerning the origin and development of this controversy.

The legislature of South Carolina in 1855 exempted the capital stock and property of the Northeastern Railroad Company from all taxation during its charter existence. In 1849 the Cheraw and Darlington Railroad Company was chartered by legislative act, and by an amendment to the charter, adopted in 1863, the last-named company was endowed with all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company; it being besides provided that the charter should not be subject to the provisions of a general law, reserving the right to repeal, alter and amend, except where otherwise specially provided.

Under the assumed authority of a law of South Carolina, providing for the assessment and taxation of property, passed in 1868, (14 So. Car. Stat. pp. 27 to 69,) the Cheraw and Darlington Railroad was assessed in the counties of Darlington and Chesterfield, through which the road ran. It became the duty of the respective treasurers of the counties named to collect the State and county taxes on the assessment thus made, and they proceeded so to do. Thereupon, in 1870, Thomas E. B. Pegues, a citizen of Mississippi, a stockholder of the Cheraw and Darlington Railroad, filed his bill in the Circuit Court of the United States for the District of South Carolina against the Cheraw and Darlington Railroad Company and the treasurers of Darlington and Chesterfield counties, seeking to enjoin the corporation from paying and the county treasurers from collecting the taxes referred to. The ground stated for the relief prayed was that the taxes in question impaired the obligation of the charter contract of exemption, and were, therefore, repugnant to the Constitution of the United

States. Various provisions of a law of South Carolina, adopted in 1870, as an amendment to the act of 1868 under which the taxes were levied, restricting the right of the corporation to resist the collection of taxes, or to recover back an illegal tax, if paid, were alleged as justifying the interposition of a court of equity. An injunction *pendente lite* was allowed, restraining the collection of the disputed taxes. By its answer the corporation admitted the averments of the bill. A joint answer was filed for the two county treasurers, signed by "The Attorney General for the State of South Carolina, for defendants." This answer admitted the assessment, the steps taken to collect the taxes and asserted their validity, and denied the existence of the alleged contract of exemption. It was averred that if such an exemption ever existed it was subject to the legislative power to repeal, alter and amend, and such repeal was alleged to have been operated by constitutional and legislative provisions, which were referred to. Jurisdiction of the court, in equity, was challenged on the ground that there was an adequate remedy at law. A final decree passed in favor of the complainant, recognizing the alleged exemption and perpetuating the injunction. An appeal was prosecuted to this court. The cause was decided at the December term, 1872. It was held that there was a contract of exemption, which would be impaired by enforcing the taxes complained of, and hence the decree below was affirmed. (*Humphrey* v. *Pegues*, 16 Wall. 244.)

For at least twenty-five years following the decision in the Pegues case no attempt was made to tax the property of the Cheraw and Darlington Railroad Company. In the year 1897 an act was passed, directing the Attorney General to proceed to test the right of any railroad company to exemption, and under this act that official sued the Cheraw and Darlington Railroad Company to recover one hundred and thirty-four thousand dollars, the sum of taxes, penalties and interest for a period of twenty years, on the alleged ground that the company had been mistakenly treated as having a contract of exemption. The Supreme Court of the State, however, without passing upon the question of exemption, decided that the right to recover did not obtain, because in any event an assessment against the railroad as provided by law was a prerequisite to the levy and collection of taxes.

From a statement made in the argument of counsel it is to be deduced that during the year 1898 the capital stock and property of the Cheraw and Darlington Railroad Company was acquired by the Atlantic Coast Line Railroad Company of South Carolina, and as the result of a charter granted to that company by the State of South Carolina, in 1898, it is conceded that the property formerly belonging to the Cheraw and Darlington Railroad Company became taxable, and that the State has since that time levied and collected the taxes due on the property. It is, moreover, conceded that the appellee on this record, the Atlantic Coast Line Railroad

Company, a Virginia corporation, acquired, in 1900, the property of the Cheraw and Darlington Railroad Company, as the successor of the South Carolina corporation which bore the same name.

In the year 1900 an act was passed in South Carolina, providing for the assessment for taxation of railroad property "which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due and for the collection thereof." The act created a board to make the assessment to which it referred, limited the taxes to be imposed to ten years back, provided that the assessment made by the board should be put upon the rolls separately for each of the back years, and that there should be levied upon such assessment State and county taxes for the years to which the back assessment related. The act caused the taxes for which it provided to become a lien against the property upon which they might bear, and directed a certification of the taxes as assessed and levied to the respective county treasurers, and made it their duty to collect the same. To this end such treasurers were directed to make a demand for payment upon the company in whose name the assessment was made, or, if it was found that the property assessed was "in the control of another company, demand should be made of the company . . . in possession of the property." By the act, in addition, the Attorney General was directed, if the back taxes assessed were not paid within sixty days after demand, to bring a suit in the name of the State, with the co-operation of such counsel as the counties might employ, to enforce the collection of the back taxes against the company in whose name they were assessed or against the company found in possession of the property assessed.

A meeting of the board appointed by this act was called in May, 1900, by the Secretary of State, for the purpose of assessing the property formerly belonging to the Cheraw and Darlington Railroad Company, and in the control and possession of the Atlantic Coast Line Railroad for a period of ten years back from 1898, on the ground that during such period the property in question had not been taxed for State or county purposes. The Atlantic Coast Line Railroad Company appeared and protested against the proposed assessment. In the protest it directed the attention of the board to the exemption act, to the injunction granted and the decree rendered and affirmed by this court in the Pegues case. The board overruled the protest and valued the property of the Cheraw and Darlington Railroad Company for a period of ten years back from 1898 inclusive. The valuation so made was certified to the officials of the counties of Chesterfield, Darlington and Florence respectively, these three counties embracing the territory included in the counties of Chesterfield and Darlington at the time the decree was rendered in the Pegues case. The State and county taxes for the years covered by the assessments were placed upon the rolls, and

the taxes were certified for collection to the county treasurers. These officers demanded payment of the Atlantic Coast Line Railroad, as the company in possession and control of the property taxed. The company refusing to pay, the Attorney General of the State of South Carolina and counsel associated with him commenced, in the Common Pleas Court in the respective counties, actions in the name of the State to enforce payment against the Cheraw and Darlington Railroad Company and the Atlantic Coast Line Railroad Company, as the corporation in possession of the property. Thereupon the Atlantic Coast Line Railroad Company, alleging itself to be a citizen of Virginia, commenced, in the Circuit Court of the United States for the District of South Carolina, the proceeding which is now before us against the Attorney General of the State, the counsel associated with him in the suits above referred to, and the treasurers of Chesterfield, Darlington and Florence Counties. The petition which initiated the proceeding was filed as ancillary to the original Pegues case, and was entitled and numbered as of that cause. It referred to the prior proceedings in the cause, including the perpetual injunction therein issued, and to the decree of this court which affirmed the same. It alleged the assessment of back taxes as above stated, the asserted lien resulting therefrom, the demand of payment and the suits brought to enforce payment, and charged that each and all of the acts done concerning the said assessment of the back taxes, including the bringing of the actions in the State court, were in direct violation and disregard of the injunction previously issued. The prayer was that the petitioner as successor in interest of Pegues be protected in the rights and privileges adjudged in the Pegues case, and be accorded the benefit of the injunction issued in that case, and to that end that the Attorney General of the State and his associate counsel be enjoined from further prosecution of the actions commenced in the State courts in the name of the State to enforce payment of the taxes, and that the respective county treasurers be enjoined from any further attempt to collect such taxes.

A preliminary injunction was granted, restraining the Attorney General and his associate counsel from further prosecuting the actions brought in the State court, and also restraining the county treasurers from further proceeding to collect the taxes. In response to a rule to show cause why the preliminary injunction should not be made perpetual the defendants answered, denying the right to the relief prayed upon grounds which, as far as now material, we shall hereafter state and consider. After hearing on petition and answers, accompanied by affidavits or admissions establishing the facts to be as we have previously stated them, a final decree was entered, perpetuating the preliminary injunction. Subsequently the court, reciting that its attention had been directed to the fact that its decree was interpreted as restraining the prosecution of suits for any tax which might have accrued from the 18th day of July,

1898, when the exemption had been surrendered, modified its decree so as to exclude from the operation of the injunction any act of the defendants looking to the collection, "by suit or otherwise, of any sum or sums of money which may be due or charged for taxes on said property of the Cheraw and Darlington Railroad Company after said eighteenth day of July, 1898, at which date it was admitted in argument the exemption established in *Pegues* v. *Humphreys* was surrendered." This appeal was then taken.

Although the errors assigned on the record are seventeen in number, in the argument at bar but six contentions were relied upon, and we shall therefore confine ourselves to their consideration.

All the propositions involved in the assignments will be disposed of by determining first, whether all the defendants on this record, including the State through its Attorney General, were parties or privies to the decree in the Pegues case; second, if they were, whether the decree in that case concluded against them the want of power to impose or collect the taxes in controversy? and, third, if it did so conclude them, whether the court below erred in granting the relief which it awarded.

First. We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the Pegues case, since it is conceded in the argument at bar that that company, as the successor to the rights of Pegues, is entitled to the protection of the original decree rendered in his favor.

On the face of the record in the Pegues case, the nominal defendants were the treasurers of the counties of Chesterfield and Darlington, in which counties the property of the railroad was situated. Those now holding the office of treasurer in each of the named counties are among the parties on this record, with the addition of the treasurer of Florence County, which county, as we have stated, consists of territory embraced in Chesterfield or Darlington County at the time of the entry of the Pegues decree. That under these circumstances the defendant treasurers, as the successors in office of the officials who were parties to the Pegues case, are privies to that decree, is established. (*Prout* v. *Starr*, 188 U. S. 537, 544.)

In deciding whether the State and its Attorney General were privies to the Pegues decree, some elementary propositions must be borne in mind.

a. In view of the prohibitions of the Eleventh Amendment to the Constitution of the United States, a State, without its consent, may not be sued by an individual in a Circuit Court of the United States.

b. A suit against State officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment. The doctrine announced in many previous cases on the subject was stated by Mr. Justice Harlan, delivering the opinion of the court in *Smyth* v.

Ames, (169 U. S. 466,) wherein, after holding that a suit against officers to prevent the doing of acts authorized by a State statute was not necessarily a suit against the State, or within the prohibitions of the Eleventh Amendment, it was said (pp. 518–519):

"It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against a State within the meaning of that amendment."

And the subject was reviewed and restated in *Prout* v. *Starr*, (188 U. S. 537.)

c. Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment. (*Clark* v. *Barnard*, 108 U. S. 436, 447.)

As then the State was not a party *eo nomine* in the Pegues case and as although the suit was against officers, it was not for that reason alone a suit against the State, it must follow that the ascertainment of whether the State was a party to that cause depends upon determining whether the taxing officers who were the nominal defendants were endowed by the State with the power, in a suit brought against them assailing the validity of taxes levied, to represent the State in the controversy so as to conclusively establish the rights of the State against the plaintiff if decree passed against him, and on the other hand to establish as against the State the rights of the plaintiff in that cause if decree passed in his favor. Thus the inquiry reduces itself to this: Did the State of South Carolina become, in substance and effect, a party to the Pegues case? In other words, did the State, through the authority which it had conferred upon the defendant officers, voluntarily submit to judicial determination the question raised in the Pegues case concerning the alleged limitation of the taxing power of the State, arising from the contract on that subject which was asserted in that case?

As a prelude to the consideration of the question just stated, it is well to determine at once the interest which the State had in the controversy which was represented by the county treasurers who were the nominal defendants in the Pegues case. Coming to do so, it is plain that the controversy which that suit involved was one in which the State was directly interested, since the officers who were the nominal defendants were charged by the State law, not only with the duty of collecting the county but also the State taxes, the validity of which was assailed on grounds which challenged the power of the State to impose any tax upon the property of the corporation during the existence of its charter. The officers were,

therefore, in a sense, State officers, charged with the performance of a duty imposed for the benefit of the State. And that those officers were considered as being *pro hac vice* State officers, for the purposes of the controversy which the Pegues case involved, is shown by the statement of the case made by this court in delivering its opinion affirming the decree. Thus it was said (16 Wall. 245, 246):

"These different enactments above mentioned being in force, the State officers of counties in South Corolina, where the Cheraw and Darlington Railroad were situate, acting under the authority of the legislature of the State, imposed certain taxes on the stock and property of that company, and were proceeding to enforce payment of them, when one Pegues, a stockholder in Mississippi, filed a bill in the court below, praying an injunction to restrain the collection."

The question, then, is narrowed to this: Were the officers endowed with authority to stand in judgment for the State in suits brought against such officers wherein the validity of the taxes was assailed?

The law of South Carolina under which the taxes were levied was adopted in 1868. Now, by section 137 of that act, (14 So. Car. Stat. 65,) the county auditors and county treasurers were authorized to employ counsel, and the counties were made liable for the fees of such counsel as well as for any damages which might be awarded against such officials, resulting from a defense made by them of any action prosecuted against the officials "for performing or attempting to perform any duty enjoined upon them by this act, the result of which action will affect the interests of the county, if decided in favor of the plaintiff in such action." It follows from this provision that where a suit was brought against a county treasurer in respect to county taxes, that official was empowered to represent the county for the purpose of the defense of its interest, and a judgment rendered against such official was therefore made binding unpon the county. It was further provided in the section that "if the State be interested in the revenue in said action the county auditor shall immediately upon the commencement of said action, inform the auditor of State of its commencement, of the alleged cause thereof, and the auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State."

We see no escape from the conclusion that the provision last quoted where suit was brought concerning State taxes, made a county treasurer, who was the State tax collector, an agent for the State, and empowered him, "for and on behalf of the State," to defend the suit, and required him, in order fully to protect the interests of the State, to be represented by the highest law officer of the State, the Attorney General. And the power which we think the section referred to conferred upon the county officers to represent the State in suits or actions is moreover persuasively indicated by a

consideration of the act of 1870, amending in certain particulars the act of 1868. (14 So. Car. Stat. 366.) Substantially, that amendment, whilst forbidding the taxpayer from enjoining the collection of taxes, created a remedial system, by which questions of asserted illegality were to be examined by the State auditor, and, where that official disallowed the claim of illegality, made it the duty of the taxpayer to pay, and, subject to certain conditions, gave a right of action to recover back the money paid. And by section 8, where such an action was brought, it was made "the duty of the Attorney General of the State to defend any suit or proceedings against any tax collector or other officer who shall be sued for moneys collected, or property levied on, or sold on account of any tax, when the State auditor shall have ordered such collector to proceed in the collection of any such tax, . . . and any judgment against such collector or officer finally recovered shall be paid in the manner provided in section 81 of the act to provide for the assessment and taxation of the property aforesaid"—that is, section 81 of the act of 1868. Now, by that section, where a judgment passed against a county official concerning State taxes which had been paid, the State was in effect made liable for the amount of the judgment. Thus, in such a case, as in cases provided for in section 137 of the act of 1868, the State through its officials was made the real defendant.

If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the State government in all its departments through a long period of years.

The answer in the Pegues case, which denied the existence of the alleged contract of exemption and asserted the existing and continuing power of the State to tax, was signed, for the defendants, by the Attorney General of South Carolina, who also, in his official capacity, verified such pleading. The word "defendants" cannot be construed as implying any other than the county officers empowered to represent the State, without imputing to the Attorney General a failure to discharge the duty directly imposed upon him by the State. This must result from the command of the statute, that he should defend the suit, the State revenue being concerned, not merely for the county officers, but "for and on behalf of the State," a command which would have been wholly disregarded if the appearance of the Attorney General be treated as having been made solely for the purpose of representing the defendants as individuals. And subsequent events show that the highest law officer of the State, when he filed the answer for the defendants in the Pegues case, intended that answer to be

what the statute caused it to be, that is, an answer for the defendants standing upon the record, for and in behalf of the State, in defense of the right of the State to collect the taxes. When the appeal was prosecuted from the final decree perpetually enjoining the officials who were named as the defendants (and, as we have seen, their successors in office) from any attempt in the future to collect a tax upon the property of the Cheraw and Darlington Railroad Company, such appeal was prayed by the same counsel who had signed the answer as Attorney General of the State, and who, upon the expiration of his term of office, was retained by his successor in office and the Governor of the State (as shown by an official report made to the legislature of the State) to prosecute the appeal and "to appear in behalf of the State." And when the appeal was heard in this court a printed argument was signed, not only by the counsel thus retained on behalf of the State by the Governor and the Attorney General, but also by the then incumbent of the office of Attorney General of the State. That this court, in deciding the appeal in the Pegues case, considered that the State was the real party appellant, is shown by the opinion, where it was said (p. 247):

"The State contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation passed in 1851."

When to all these conclusive considerations there is added the fact that we have not been referred to any legislative action repudiating the conduct of the Governor and the Attorney General in the defense of the Pegues suit for and on behalf of the State, and when besides we take into account the failure of the State government in all its departments, for more than twenty-five years following the decision of the Pegues case, to assert any right to tax in conflict with the contract exemption which the Pegues decree sustained, the binding efficacy of the decree in that case upon the State of South Carolina seems to us beyond the reach of serious controversy. Indeed, we are not left to conjecture that the inaction of the State was the result of what was deemed to be the conclusive effect on the State of the Pegues decree, since it is shown that in one or two instances after that decree was rendered where preliminary steps were taken by the taxing officials of the State to impose taxes on the property of the railroad, such efforts were at once abandoned in consequence of the advice of Attorneys General of the State that the decree in the Pegues case was conclusive and the property could not be taxed.

Concluding, as we do from the terms of the act of 1868, that the officers who were named as defendants in the Pegues case were, for the purpose of that litigation, the agents voluntarily appointed by the State to defend its rights and submit them to judicial determination, we content ourselves with saying that it is unnecessary to review the case of *Corbin* v. *Stone*,

(16 So. Car. 533,) and other decisions of the Supreme Court of South Carolina, pressed upon our attention, since those cases did not involve the statute of 1868 or statutes of like import. And, moreover, we must not be understood as holding that other provisions of the law of South Carolina, relied upon in argument, would be inadequate to bind the State by the action of its Attorney General, if the provisions of the act of 1868 did not exist. Into that consideration we have not entered.

Second. The State of South Carolina and its Attorney General, and his associate counsel, as the agents of the State, being, therefore, privies to and bound by the decree in the Pegues case, we must determine what was concluded by that decree. That the issue in the case was the existence of a charter exemption from taxation in favor of the Cheraw and Darlington Railroad Company, and the consequent want of power of the State to tax the property of the railroad during the continuance of the exemption, is obvious. And that the decree rendered in the cause established the exemption embraced in the issues is also obvious. This being true, it unquestionably follows that the decree established as to the parties and their privies the very question in issue in this proceeding. Escape from this inevitable result is sought to be accomplished by several propositions, all of which we think are unsound.

a. The complaint in the Pegues case, it is said, mistakenly averred that the Cheraw and Darlington Railroad had not been built at the time the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the Attorney General it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. (*United States* v. *California & Oregon Land Co.*, 192 U. S. 355; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300 *et seq.*, and cases cited.) And although it be conceded for the sake of argument that the doctrine of *res judicata*, as announced in rulings of the Supreme Court of South Carolina, lend support to the contention made, our duty is to give to the decree of the Circuit Court of the United States in the Pegues case the force and effect to which it is entitled under the principles of *res judicata* as settled by this court, especially in view of the fact that the controversy in the Pegues case involved rights protected by the Constitution of the United States. (*Deposit Bank* v. *Frankfort*, 191 U. S. 499.)

b. It is urged that as the taxes, the collection of which the court enjoined, were not for the same years as were the taxes with which the Pegues case was concerned, the Pegues decree was, therefore, not *res judicata*, because it related to a different cause of action. This rests upon the assumption that a decree enjoining the collection of a tax for one year can never be the thing adjudged as to the right to collect taxes of a subsequent year. But the proposition entirely disregards the fact that the decree in the Pegues case, enjoining the collection of the taxes in controversy in that case, was rested upon the ground that there was a contract protected from impairment by the Constitution of the United States which was as controlling on future taxes as it was upon the particular taxes to which the Pegues suit related. The contentention, therefore, simply asserts that a contract right of exemption was beyond the pale of judicial protection, because rights under such contract could never be sanctioned by final judicial action. Besides, the proposition is not open to controversy. (*New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Deposit Bank* v. *Frankfort*, *supra.*)

Third. It is insisted that the court below had no power to restrain the Attorney General of South Carolina and the counsel associated with him from prosecuting in the State courts actions authorized by the laws of the State, and hence that the court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of section 720 of the Revised Statutes, forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted. (*In re Ayres*, 123 U. S. 443; *Fitts* v. *McGhee*, 172 U. S. 516.) The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statues was originally adopted in 1793, whilst the Eleventh Amendment was in process of formation in Congress for submission to the States, and long, therefore, before the ratification of that amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals. None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction and its want of authority to entertain a contro-

versy as to which jurisdiction is not possessed. From this it follows that, as in the Pegues case, the court had acquired jurisdiction with the assent of the State of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief, to make its decree effective, cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain. In other words, the proposition relied upon is disposed of by the conclusion which we have previously expressed concerning the persons who were parties and privies to the decree rendered in the Pegues case. Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. (*Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Prout* v. *Starr*, 188 U. S 537; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112.)

And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the State courts to the actions brought by the Attorney General. That question was foreclosed by the decree in the Pegues case. So also does the reasoning dispose of the assertion that because a part of the tax for the year 1898 may have been due, therefore tender should have been made before invoking the power of the court to protect its jurisdiction and enforce the prior decree. The amendment of the decree made by the court eliminated from the controversy all question concerning the portion of the tax not covered by the decree in the Pegues case. Having acquired by that decree a right which the petitioner was entitled to enforce, whatever might have been the rule of tender as applied to other cases, that rule could not rightly be invoked to deprive the court below as a court of equity of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court.

Affirmed.

Mr. Justice BROWN dissents.

True copy.

Test:

Clerk Supreme Court, U. S.